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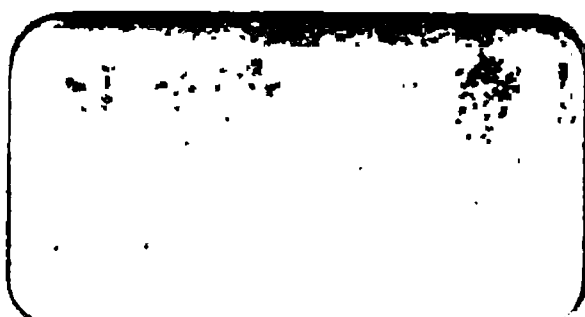
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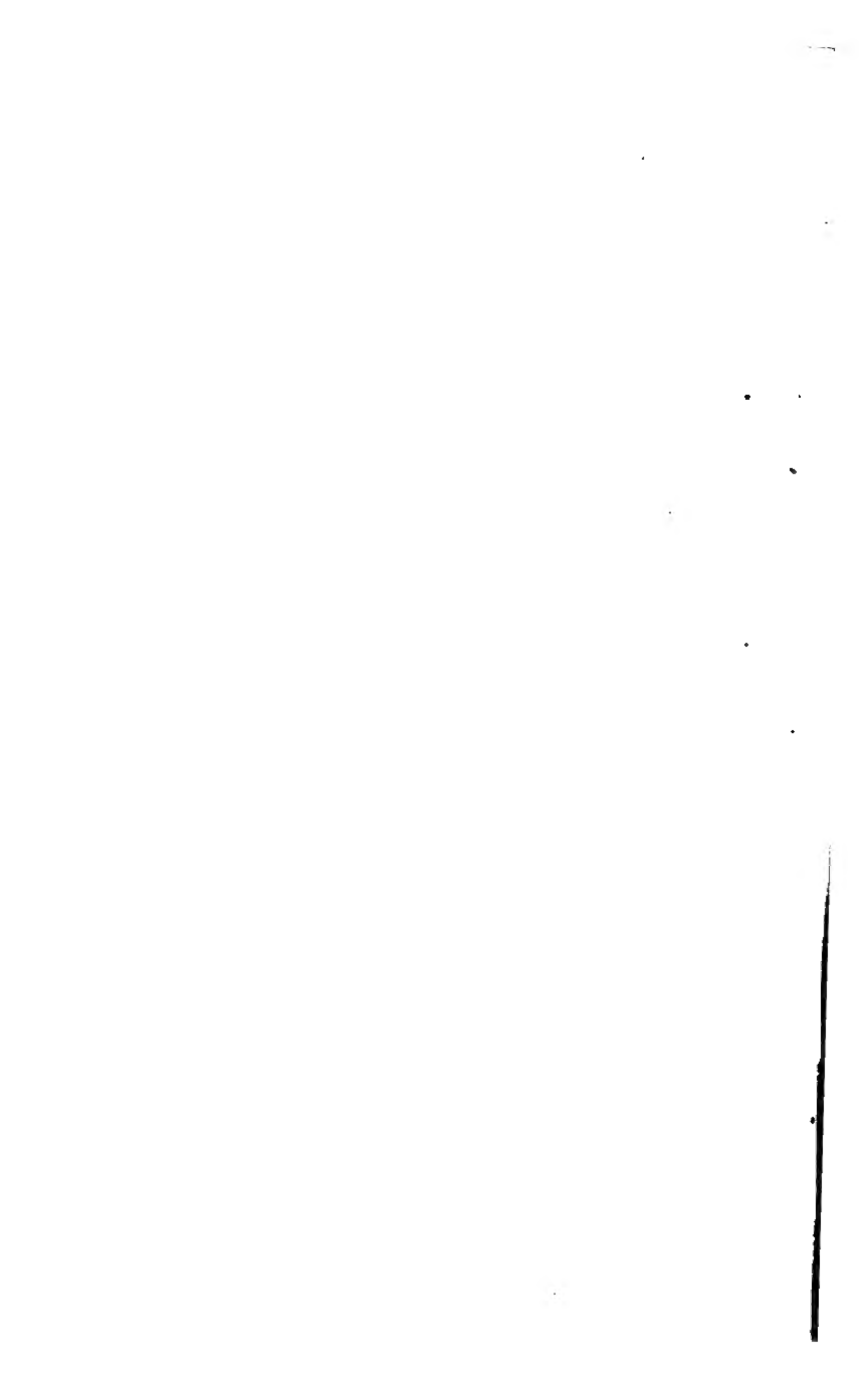






**VOL. 52—INDIANA REPORTS.**

43



June 20

## REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES  
CITED AND AN INDEX.

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BY JAMES B. BLACK,  
OFFICIAL REPORTER.

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VOL. LII.

CONTAINING THE CASES DECIDED AT THE NOVEMBER  
TERM, 1875, NOT PUBLISHED IN VOL. L. AND  
VOL. LI., AND CASES DECIDED AT  
THE MAY TERM, 1876.

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INDIANAPOLIS:  
INDIANAPOLIS PRINTING AND PUBLISHING HOUSE,  
PRINTERS AND BINDERS.  
1876.

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF JUDICATURE**  
**DURING THE TIME OF THESE REPORTS.**

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**HORACE P. BIDDLE, LL. D.\***

**ALEXANDER C. DOWNEY, LL. D.†**

**JAMES L. WORDEN, LL. D.**

**SAMUEL H. BUSKIRK, LL. D.**

**JOHN PETTIT, LL. D.**

\*Chief Justice at the November term, 1875.

†Chief Justice at the May term, 1876.

**CASES**  
**ARGUED AND DETERMINED**  
 IN THE  
**SUPREME COURT OF JUDICATURE**  
 OF THE  
**STATE OF INDIANA,**  
 AT INDIANAPOLIS, NOVEMBER TERM, 1875, IN THE  
 SIXTIETH YEAR OF THE STATE.

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130	369
52	1
139	467

**THE WESTERN UNION TELEGRAPH CO. v. FENTON.**

**TELEGRAPH. — Negligence. — Statute. — Damages.**—Suit against a telegraph company to recover damages for negligence of the defendant in failing to deliver, within a reasonable time, a telegram directed from a place without this State to the plaintiff at a place within this State, because of which negligence the plaintiff failed to obtain employment as a steamboat pilot at certain wages per month, for a trip, and, if he suited, for the season, he not obtaining employment for some time thereafter, and the sender of said message not acting as the plaintiff's agent in sending it.

*Held*, that, under our statute, the plaintiff might recover, though the relation of contractors did not exist between him and the telegraph company.

*Held*, also, that the damages sought by said action were not remote or speculative.

**SAME.—Stipulation for Repeating Message.**—A telegraphic dispatch was sent under stipulations, agreed to by the sender, providing for repeating messages at one-half the usual rates in addition, and that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeatd message, beyond the amount received for sending the same, and the sender did not order the repeating of the message, or pay or offer to pay for repeating it, but paid merely the regular rate.

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*Held*, that these facts could constitute no defence to an action brought by the person to whom the message was sent against the telegraph company for negligence of the defendant in failing to deliver the message in a reasonable time, the making prompt delivery dependent on such repetition being unreasonable, and the company, like a common carrier, being unable to contract against liability for its own negligence, and the action being based upon the statute, and not upon contract between the parties.

**PRACTICE.**—*Immaterial Issue.*—Where a paragraph of answer in confession and avoidance is bad, and no demurrer thereto is filed, but issue is taken thereon, and, upon the trial, its allegations are proved to be true, it does not follow that the finding should be for the defendant, but such immaterial issue should be disregarded.

From the Dearborn Circuit Court.

*J. Schwartz and McDonald & Butler*, for appellant.

*F. Adkinson and G. M. Roberts*, for appellee.

**WORDEN, J.**—Complaint by the appellee against the appellant, in four paragraphs, to recover damages for alleged negligence on the part of the appellant, in failing to deliver to the plaintiff, within a reasonable time, a certain telegram.

Demurrer to each paragraph for want of sufficient facts overruled, and exception.

Answer, issue, trial by the court, finding and judgment for the plaintiff for the sum of two hundred and ten dollars, a motion for a new trial on the part of the defendant having been made and overruled. Exception.

The case made by the evidence was, in brief, this: The plaintiff lived in Aurora, Indiana, and his business was that of a steamboat pilot between Cincinnati and New Orleans. On December 17th, 1870, he was out of employment. A few days before that time, he had a conversation in Cincinnati, with A. J. Schenk, who was the owner and captain of the steamboat "Argosy," then plying upon the Ohio and Mississippi rivers, in reference to the employment of the plaintiff, by Schenk, as a pilot on said boat. On the day above named, John B. Evelyn, who was a pilot on the boat mentioned, under the direction of Schenk, sent, by the defendant's telegraphic line, the following dispatch to the plaintiff, from Cincinnati to Aurora, viz.:

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"To Base Fenton, Aurora: Will you go on Argosy with me for one hundred and fifty dollars? Answer immediately.

"JOHN B. EVELYN."

This dispatch was received by the defendant at its office in Aurora, at about two o'clock P. M. on the day named, but was not delivered to the plaintiff until about nine o'clock on the evening of the same day.

The gist of the action was the alleged negligence of the defendant in failing to deliver the dispatch within a reasonable time. The boat "Argosy," which was then lying at Cincinnati, ready to start down the river, waited until between six and seven o'clock on that evening, to hear from the plaintiff, but not hearing from him, procured another pilot at Cincinnati, and started on her trip. Had the plaintiff got the dispatch in time, and answered it, the boat would have stopped for him at Aurora, and he would have been employed, not for that trip only, but for the season, if he suited. It was some time before the plaintiff found other employment.

The facts, so far as we can see, are well enough stated in each paragraph of the complaint. No objection is pointed out to the complaint, or either paragraph thereof, except that the alleged damages are too remote and speculative, and that there was no privity shown between the plaintiff and defendant. On the last point, we are referred to the case of *Playford v. The United Kingdom Electric Telegraph Company*, Law Rep., 4 Q. B. 706; S. C., Allen's Telegraph Cases, 437. If we are to regard the decision in the case referred to as the law applicable to this case, there was no valid cause of action shown in favor of the plaintiff against the defendant, either in the complaint or by the evidence. In that case, it was held that the obligation of a telegraph company to use due care and skill in the transmission of a telegram is one arising entirely out of the contract which is made for its transmission; and that the receiver of a telegram cannot maintain an action against the company to recover damages for negligence in the transmission, unless the sender in send-

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ing it acted as his agent. But it seems to us that this may be too narrow a view of the question. A telegraph company, exercising corporate franchises, whose business it is to transmit and deliver messages, owes certain duties to the public; and among those duties is that of delivering, without unreasonable delay, messages which are thus transmitted. For a violation of that duty, the company, it would seem, ought to be responsible to the party injured. See note to the case cited in Allen.

But however this may be in the absence of any statute on the subject, we have the following provision: "Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering dispatches; or for the disclosure of the contents of any private dispatch to any person other than to him to whom it was addressed or his agent." 1 G. & H. 611, sec. 2.

This section is clearly broad enough to authorize a person to whom a dispatch is sent to recover, in a proper case, though the relation of contractors does not exist between him and the company.

With regard to the damages, they are neither remote nor speculative. We gather from the evidence that the plaintiff would have realized from the employment at least one hundred and fifty dollars per month; and it is clear that, but for the alleged negligence of the defendant in failing to deliver the dispatch in a reasonable time, he would have obtained the employment. His failure to receive the employment was the direct result of the delay in delivering the dispatch.

There was evidence tending to show negligence on the part of the company in not delivering the dispatch at an earlier hour. The dispatch might, for aught that appears, have been delivered to the plaintiff within say half an hour or less from the time it was received at the defendant's office at Aurora, and it seems to us that no diligent effort was made to find and deliver to him the dispatch. We cannot,

in view of the well-established practice, disturb the finding below on this point.

The damages are claimed to have been excessive. We, however, are of opinion that the evidence fairly justified the amount found. Evidence was offered for the purpose of showing that the failure of the plaintiff to receive the dispatch sooner was the consequence of his own negligence; but upon this point it was conflicting, and the finding cannot be disturbed.

There remains another point to be considered. The defendant, in the third paragraph of answer, alleged, in substance, that the dispatch was sent under stipulations, agreed to by said Evelyn, providing, amongst other things, for repeating messages at one-half the usual rates in addition, and that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeatd message beyond the amount received for sending the same; that Evelyn did not order the message repeated, or pay or offer to pay for repeating the same; that he paid the regular rates, forty-five cents; that the dispatch was duly received at the office of the defendant in Aurora in time for the plaintiff, had he called for it, to have answered it and obtained the employment; but that he did not call for it until nine o'clock, when he called and received it. The paragraph offers to confess judgment for the forty-five cents.

No demurrer was filed to this paragraph of answer, but it was traversed by a replication in denial; and, moreover, it was clearly proved to be true on the trial.

The answer was clearly bad, the facts therein alleged being no defence whatever to the action. The gist of the action, as we have already seen, was the negligence of the company in failing to deliver the dispatch. The object, as we suppose, of repeating a message is to prevent mistakes in the transmission. How the repetition of a message would conduce to its prompt delivery we do not see. *Western Union Telegraph Co. v. Graham*, 9 Am. Rep. 136.

But, aside from the unreasonableness of a contract by

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which the prompt delivery of a message is made to depend upon its repetition at an additional expense, the defendant could not contract against liability for its own negligence. *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; S. C., 1 Am. Rep. 285; *The Western Union Telegraph Co. v. Buchanan*, 35 Ind. 429; *The Western Union Telegraph Co. v. Meek*, 49 Ind. 53.

We see no reason for any distinction between telegraph companies and common carriers of goods in this respect. See *The Michigan Southern & Northern Indiana R. R. Co. v. Heaton*, 37 Ind. 448.

There is another consideration in respect to the matter pleaded, which is not to be overlooked. The action, as we have seen, is based upon the statute, and not upon any contract between the parties. It would seem, in such case, that the contract between the sender of the message and the company could have no effect upon the rights of the party to whom the message is sent, the relation of principal and agent not existing between the parties from and to whom it is sent.

But it is claimed by counsel for the appellant that, conceding the paragraph of answer to have been bad, inasmuch as no demurrer was filed to it, but issue was taken on it, and it was proved to have been true in point of fact on the trial, the court should have found for the defendant, and, therefore, that a new trial should have been granted. The statute provides that "unless the objection" (to an answer) "be taken by demurrer, it shall be deemed to be waived." 2 G. & H. 92, sec. 64. And it is claimed that, as objections to the answer are deemed to be waived, it is to be regarded as good, and as it was proved to be true in point of fact, the defendant was entitled to a finding and judgment in its favor. The above provision of the code, however, is very much modified, if not completely abrogated, by a subsequent one, as follows: "Where upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." 2 G. & H. 218, sec. 372. If the two

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sections cannot stand together, the latter must prevail over the former. Supposing the paragraph in question had been the only one pleaded to the complaint, thus confessing the complaint, but setting up matter in avoidance, that is no defence whatever to the action. Notwithstanding a verdict might have been found for the defendant on the issue joined on the answer, the plaintiff would have been entitled to judgment on the pleading, because his complaint would have stood confessed, and no valid matter set up in bar of it. This result, however, could not follow, if no objection could be urged to the answer, and if it is to be taken as conclusively good in point of law because no objection was made to it by demurrer. Now, if a verdict in favor of a defendant on an immaterial issue, thus tendered, would not entitle him to judgment, we think it could not be error on the part of the court trying the cause, as was evidently done in this case, to disregard the issue, and find for the plaintiff, although the immaterial facts thus alleged by the defendant might be proved. *Freitag v. Burke*, 45 Ind. 38.

The judgment below is affirmed, with costs.

ON PETITION FOR A REHEARING.

WORDEN, J.—The appellant has filed a petition for a rehearing in this case, claiming, as we understand the petition, that the statute referred to in the principal opinion, making telegraph companies liable for damages occasioned by failure or negligence in certain cases, can have no application in this case, inasmuch as the dispatch in this case was sent from Ohio, another jurisdiction, in which our law can have no force.

If the failure of the company to deliver the dispatch had occurred in Ohio, the dispatch having been sent from one point to another in that State, it might be conceded that our statute would not control the case. But the negligence of the company occurred in Indiana, where the dispatch was received, at the point to which it was transmitted. The

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company was guilty of no negligence in Ohio. The dispatch was duly transmitted from Ohio to the defendant's office at Aurora, Indiana, its point of destination. The negligence of the company consisted in her failure to promptly deliver the dispatch to the appellee after it had been thus transmitted to her office in Indiana. The statute, in our opinion, clearly applies to such case, whether the dispatch be sent from a point within or without the State.

Petition for a rehearing overruled.

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WINSLOW ET AL. v. WINSLOW ET AL.

**CONVEYANCE.—*To Heirs.***—A deed made to the heirs of a living person named therein, without giving the names of the heirs, is void.

**PLEADING.—*Action for Partition and to Quiet Title.***—*Answer.*—To an action for partition and to quiet title, an answer alleging that the defendant has been for more than twenty years before the commencement of the action in the exclusive and peaceable possession of the real estate, claiming title by conveyance from the person under whom the plaintiffs claim, is not bad for not alleging that the action was not commenced within twenty years after the cause of action accrued; but it is bad for not alleging that the adverse possession was continuous and uninterrupted.

**SAME.—*Cross Complaint.***—To a complaint for partition and to quiet title, an answer by way of cross complaint, alleging that the ancestor under whom the plaintiffs claim, in consideration of a certain sum of money and for love and affection, agreed to convey the real estate in question to the defendant, and did put him in possession, and that he is still in possession, is good as a cross complaint for the specific performance of the contract.

**SAME.**—An answer in such case, by way of cross complaint, alleging that the plaintiffs ancestor, under whom they claim, gave the real estate in question to the defendant as an advancement, put him in possession, and that he has made lasting and valuable improvements thereon, and paid the taxes, and that he has ever since remained in possession, is bad.

**SAME.—*Parties.***—An answer seeking affirmative relief should be in the form of a cross complaint, and where affirmative relief is sought against the plaintiff and the co-defendants, they should be made parties to the cross complaint.

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**CONTRACT.**—*Reformation of Contract.*—Where the terms of a contract are uncertain and loosely stated, a judgment reforming it will not be rendered.

From the Henry Circuit Court.

*D. W. Chambers, E. Saint, J. Brown and J. M. Brown*, for appellants.

*M. E. Forkner and E. H. Bundy*, for appellees.

DOWNEY, J.—This was a petition for the partition of certain real estate. The plaintiffs are heirs of Peter Winslow, deceased, who, it is alleged, died the owner in fee simple of the real estate, in 1855, against Nathan Winslow, Daniel Winslow and Joseph Winslow, also heirs of the deceased, and one John Hazelrigg. The complaint, in addition to asking for partition of the real estate, also prayed that the title to the land be quieted.

Joseph Winslow answered in five paragraphs, the fourth of which was a general denial. A demurrer to the first, second, third and fifth paragraphs was sustained as to the first, third and fifth, and overruled as to the second. There was a reply to this answer in two paragraphs, the first of which was a general denial. A demurrer to the second paragraph of the reply was overruled.

Nathan Winslow answered in five paragraphs, the first of which was a general denial. A demurrer was sustained to the third, and overruled as to the second, fourth and fifth. There was a reply in two paragraphs, the first of which was a general denial, and a demurrer to the second was overruled.

The pleadings of Daniel Winslow and John Hazelrigg need not be noticed, as no question is raised by them. There was a trial by the court, a judgment for the plaintiffs, a motion for a new trial overruled, and final judgment, after the appointment and report of commissioners.

Joseph Winslow assigned as error:

1. Sustaining the demurrer to the first paragraph of his answer.

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2. Sustaining the demurrer to the third paragraph of his answer.

3. Sustaining the demurrer to the fifth paragraph of his answer.

4. Overruling the demurrer to the second paragraph of the reply.

5. Refusing him a new trial.

6. That the complaint does not state facts sufficient to constitute a cause of action.

Nathan Winslow assigns as error:

1. Sustaining the demurrer to the second paragraph of his answer.

2. Sustaining the demurrer to the third paragraph of his answer.

3. Overruling his demurrer to the second paragraph of the reply.

4. Refusing to grant a new trial.

The complaint asked that the title of the plaintiffs be quieted for the reason that in his lifetime Peter Winslow had executed a deed for a part of the land to the heirs, without name, of said Nathan Winslow, the said Nathan being then living, and had also executed a deed in like manner to the heirs of Joseph Winslow, Nathan Winslow, Daniel Winslow, Henry Winslow, John Winslow, William Winslow, Edward Winslow, Sarah Hall, and Sue Thurnian, for another part of said real estate; to the heirs of Joseph Winslow for another part of the said land; and to the heirs of Daniel Winslow for another part, which he conveyed to Hazelrigg. It is not contended but that these deeds were void, for the reason that no one can have heirs while living, and that, therefore, the grantees cannot be ascertained. Such we find to be the law. *Hall v. Leonard*, 1 Pick. 27; *Morris v. Stephens*, 46 Pa. St. 200; Washb. Real Prop., vol. 3, p. 240, sec. 33.

The sixth assignment of error by Joseph Winslow, calling in question the sufficiency of the complaint, or petition, is not urged by counsel, and need not be particularly examined. We see no objection, however, to that pleading.

The first paragraph of the answer of Joseph Winslow is as to a part of the real estate, and alleges, "that he is now, and has been for more than twenty years before the commencement of this action, in the exclusive, quiet and peaceable possession and control of said tract of land, claiming title thereto by conveyance from Peter Winslow, named in said complaint, without any claim by said Peter during his lifetime, or by the plaintiff or the other defendants, or either of them, either to the title or possession of said land or any interest therein, or use or profits thereof during all that period, although having full notice of all the above facts."

Counsel for the appellee insist that this paragraph is bad, for the reason that it is not alleged therein that the action was not commenced within the specified period after the cause of action accrued. We are referred to *Vanduyne v. Hepner*, 45 Ind. 589. That was not an action for partition.

When does the cause of action accrue in partition? The ancestor died in 1855, as alleged in the complaint. The action was commenced in 1873. Fifteen years is probably the time limited within which the action for partition must be brought, after the cause of action has accrued. 2 G. & H. 160, sec. 212. Joint tenants, tenants in common and co-partners may have partition at any time. Suppose they do not demand it for fifteen years after they might do so, but choose to occupy and enjoy their lands together until after the lapse of that time, does this prevent them from having partition afterwards when they desire to enjoy their lands in severalty?

Again, suppose the defendant in this action had held the land adversely to the deceased, and that the deceased might, on that account, have sued for possession of the land in his lifetime, but did not do so. The right to sue for partition could not accrue to the plaintiffs until after the decease of the ancestor. Suppose that had occurred within fifteen years, must the defendant in possession be able to plead that the cause of action for partition did not accrue within fifteen years? If so, of what avail to him is his adverse holding or

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the running of the statute of limitation before the death of the ancestor? We think that this objection to the answer cannot avail. See *Jenkins v. Dalton*, 27 Ind. 78. This case expressly decides that an answer in the form suggested by counsel for appellee would not be good.

It is further urged, as an objection to the answer, that it does not show that the adverse possession for twenty years before the commencement of the action was continuous and uninterrupted. Conceding, but not deciding, that there is no other valid objection to the answer, we think this one is well taken. A considerable degree of strictness is required in judging such a pleading. Tyler Eject. 907, *et seq.* The author says:

“If there be one element more distinctively material than another in conferring title by adverse possession, when all requisites concur, it is the existence of a *continuous* adverse possession for the whole period prescribed by the statute of limitations. If the possession, though adverse in its character, becomes broken, that moment it ceases to be effectual.” It is so decided in *Law v. Smith*, 4 Ind. 56. Hence the necessity that the answer shall distinctly show that the adverse possession was continuous and uninterrupted. This we think the answer in question does not do.

The third paragraph of the answer of Joseph Winslow, which is in the form of a cross complaint, alleges that, on the 1st day of January, 1848, the deceased, in consideration of four hundred dollars paid by the defendant and for love and affection, agreed to convey the land claimed by the defendant, describing it, to said defendant, in fee simple, put the defendant in possession of the land, and since the sale he has remained in the peaceable and quiet possession of the same, and has made valuable and lasting improvements thereon to the value of two thousand dollars, by building a house, stable, smoke-house, etc., has paid the taxes, amounting to four hundred dollars; that the plaintiffs stood by and saw the improvements made, the same having been made after the death of said deceased, without asserting any claim,

etc. The defendant asks that his title be determined and quieted, etc. The plaintiff and defendants, other than Joseph, are made defendants to this cross complaint.

We think this paragraph is good as a cross complaint. It alleges a sale of the land by the deceased and the payment of the consideration; that the vendee was put in possession under the contract, and made lasting and valuable improvements thereon. It seems to us to be a good cross complaint for the specific performance of the contract. Conceding that performance of a contract for the consideration of love and affection cannot be decreed, still there was a pecuniary consideration of four hundred dollars paid, which would support the promise.

The fifth paragraph is also pleaded as a cross complaint. It alleges that the deceased, in 1840, gave the defendant the particular tract of land claimed by him as an advancement, and put him in possession thereof; that he has made valuable and lasting improvements and paid the taxes thereon; and that he has remained in the possession thereof ever since. It is also alleged that at the same time the deceased gave as an advancement to Daniel Winslow, another son, a certain other tract of land, which was conveyed to his children, and to Nathan Winslow a certain other tract. The defendant asks that the said land be conveyed to him.

This promise of the father was without any valuable consideration, and we think the performance of it cannot be enforced for that reason. Courts do not compel the specific performance of voluntary contracts, or contracts where no consideration emanates from the party seeking the performance. Fry *Specific Perf.* 71, and n. 10, 2d Amer. ed.; *Randall v. Ghent*, 19 Ind. 271; *The German Mut. Ins. Co. v. Grim*, 32 Ind. 249, and cases cited.

The assignment of error of Nathan Winslow relating to the demurrer to the second paragraph of his answer can only relate to that answer as originally filed. It was amended, and the demurrer then overruled. There is nothing in this.

The third paragraph of the answer of Nathan Winslow

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assumes to defend as to so much of the real estate as he possessed, and alleges that the deceased, in 1849, sold to him a life estate therein, with remainder to his heirs, for four hundred dollars, which he then paid; that the deceased executed to him a deed, a copy of which is filed, but through the mistake and ignorance of the draftsman of the deed and the mistake of said deceased, the name of the defendant was erased and defaced in said deed, without the consent of this defendant; that it was the intent and purpose of the deceased to convey to defendant a life estate in said land, with remainder over to his children; that the deceased put the defendant in possession under the deed, which possession the defendant has ever since held; that he has paid all taxes on said land, and has made many lasting and valuable improvements, etc. Wherefore he asks that the said deed be reformed, and that he be quieted in his said title, etc.

We think the demurrer to this paragraph was properly sustained, for several reasons:

In the first place, it seeks affirmative relief, and should have been in the form of a cross complaint. Affirmative relief cannot be granted upon an answer merely. As a cross complaint, it should have made parties thereto, not only the plaintiffs, but also those of the co-defendants who, as heirs, had an interest in the land.

Again, it seems to us that the terms of the contract are too uncertain and too loosely stated to warrant a judgment reforming the contract. It is first alleged that the contract was to convey to the defendant a life estate with remainder to his heirs; and afterwards, it is stated that it was the intent and purpose of the deceased to convey to the defendant a life estate and the remainder to his children. The estate created by a deed in one form would be substantially different from that which would be vested by a deed in the other form. The court could not know how to reform the deed.

Another objection to the case made is, that it does not appear that the defendant did not accept the deed with full knowledge of its form and contents. It is true that it is

averred that the name of the defendant was erased from the deed without his consent. But we must presume that this was done before the delivery of the deed to him, as the contrary is not alleged. Why did he receive it in that form?

Assuming that the pleading could be held to be a cross complaint, still, we think, for the reasons stated, it could not be upheld, and the demurrer to it was properly sustained.

There was no error in overruling the demurrers to the second paragraphs of the replies to the answers of Joseph and Nathan Winslow. The replies were to paragraphs of answer setting up a claim for improvements made on the land, etc., and the replies asserted a claim for the use of the lands occupied by the defendants as a satisfaction for, or set-off against, such improvements. This question is not argued or urged by appellants.

No question arises under the assignment of errors relating to the overruling of the motion for a new trial. The bill of exceptions is not properly in the record. On the 27th day of March, 1873, sixty days were given in which to file the same, and it was filed on the 13th day of December, 1873. This was not within the time allowed.

On account of the ruling of the court on the demurrer to the third paragraph of the answer or cross complaint of Joseph Winslow, the judgment as to him will have to be reversed.

The judgment against Joseph Winslow is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the third paragraph of his answer or cross complaint; and, as to the other appellant, the judgment is affirmed, with costs.

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PRATHER v. THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS RAILROAD CO. ET AL.

RAILROAD. — *Width of Right of Way Appropriated. — Erection of Telegraph Poles.—Additional Appropriation of Land.*—By the original charter of a railroad company granted in 1846, the president and directors thereof were invested with all the rights and powers necessary for the construction and repair of a railroad between certain places named, within this State, “not exceeding sixty feet wide;” an amended charter enacted in 1849, before the construction of its road by said company, which did not expressly repeal any portion of the original charter, provided that “for the purpose of constructing said road, with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon,” said company was authorized “to enter upon, take and hold in fee simple all real estate and materials necessary for that purpose, doing no unnecessary damage;” the qualifying words, “not exceeding sixty feet wide,” contained in the original charter, not being inserted in the amended charter, which provided that said company should, within ten years, sell and dispose of all lands granted, conveyed or released to it, “except so much as may be embraced in the width of the road allowed by the charter,” etc., and also provided that when such real estate and materials necessary for such purpose could not be had by donation or fair purchase, the owner was authorized to have the damages assessed in a mode therein provided, and that all claims for damages should cease unless applied for in two years next after the company had taken possession of such real estate or materials. Said company, by its agents, entered upon and took possession of certain land, without donation, purchase, condemnation, assessment of damages or claim therefor made by the owner, but with his acquiescence; and said company constructed its railroad over said land, and erected telegraph poles, with wires thereon, on one side of said railroad, at the distance of nineteen feet from the center of the track.

*Held*, that, construing the amended charter in connection with the original charter and with the whole current of legislation in this State regulating the right of eminent domain by uniformly fixing a limit to the width of the right of way, the amended charter did not enlarge the width of the right of way, as defined by the original charter.

*Held*, also, that while said company might have acquired title to sixty feet in width of said land, if it had taken possession thereof and occupied such space; yet, having appropriated and used less than that width, its right being limited by its necessities to the extent that it occupied and used, it became entitled, not merely to the strip of ground on which the railroad track was constructed and the ground actually occupied by said telegraph poles, but, also, to the amount of land necessary for the purpose of constructing its road, with all necessary appendages, and for put-

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ting and keeping the same in repair, and for doing all proper business thereon, including sufficient land for the erection of telegraph poles at a safe distance from the track, together with the right to the exclusive use of the intervening space between said track and the fixture or appendage so erected.

*Held*, also, said company having so erected telegraph poles on but one side of its road and made no use of the other side, except for the purpose of keeping its track in repair, for a period of eighteen years from the time of the original appropriation, that said company possessed no right to erect telegraph poles on said other side of its track at the distance of twenty-nine feet from the center thereof, without condemnation and payment of damages in the mode provided by the law or charter by which such railroad was governed at the time of such new appropriation.

From the Bartholomew Circuit Court.

*F. T. Hord*, for appellant.

*S. Stansifer, C. Baker, O. B. Hord and A. W. Hendricks*, for appellees.

BUSKIRK, J.—This was an action by the appellant against the appellees to recover damages for trespass, in forcibly entering on appellant's lands, without right, destroying growing timber, excavating holes and erecting telegraph poles, with wires thereon, with a view to appropriate said lands, and divesting appellant thereof, without first assessing and tendering compensation therefor. And appellant seeks an injunction to prevent such possession, further use and appropriation, and to abate such structures as may have been placed there, as a nuisance, and to prevent their repetition by injunction, and all proper relief.

The appellees filed a joint answer in two paragraphs. The first a general denial, and the second a special answer. The first paragraph was struck out by appellees, and they stood on the second paragraph of answer.

The appellant filed his reply, and appellees demurred thereto, for the reason that the same did not state facts sufficient to constitute a reply to the answer. Appellant insisted that the demurrer should be carried back to the answer, to which it should be sustained. The court overruled

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the demurrer to the answer, appellant excepting, and sustained that to the reply, to which exception was taken.

The appellant refusing to plead further, final judgment was rendered for the appellees.

It is indispensably necessary to an intelligible understanding of the questions of law arising in the record, that we should set out the complaint, answers and replies, and they are as follows:

“Reason W. Prather complains of the Western Union Telegraph Company, Martin Eagin, John Brisbin, Horace Scott, Dillard Rickets, and the Jeffersonville, Madison and Indianapolis Railroad Company, and says that he is the owner, in fee simple, and is now and was possessed at the time hereinafter mentioned, of the following real estate situated in Bartholomew county, in the State of Indiana, and described as follows, to wit: the east half of the southwest quarter section of section five, in township seven north, of range six east; also the north half of the northwest quarter of section eight, township seven north, of range six east; that said defendants, on the — day of —, 1870, without right, wrongfully and unlawfully entered on the said land of plaintiff, and did then and there, without right, chop down and destroy twelve growing trees on said land for the purpose of clearing the way for planting telegraph poles and placing wires thereon, to be used by said defendants for telegraphing purposes, and then and there dug large holes in said land and placed therein telegraph poles, numbering about two hundred, across the entire length of said land, for the purpose of acquiring a proprietary interest and easement on said lands for telegraphing uses; that plaintiff then and there removed said poles from his said land, and said defendants did then and there again put said poles on plaintiff's land, as aforesaid, and plaintiff then and there again removed them; and then and there plaintiff removed said poles seven times, and as often as removed defendants then and there followed and replaced the same; and finally then and there defendants placed said poles as aforesaid on plaintiff's lands,

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and placed their telegraphic wires thereon, for the purpose of using the same for telegraphing, in defiance of plaintiff and against and over his objection; that prior thereto said defendants never assessed or caused to be assessed and tendered his damages, nor have defendants since assessed or tendered his damages, for said attempted usurpation of plaintiff's land, and said defendants threaten to replace said poles and wires as often as the same may be removed, and threaten to continue said poles on said land, with the wires thereon, for the purpose of acquiring an easement on plaintiff's said lands, and also threaten to annoy and vex plaintiff with criminal indictments and prosecutions if he shall remove said poles and wires so unlawfully as aforesaid on his lands; that if defendants are permitted to continue their said poles and wires on his said land, plaintiff will suffer great and irreparable injury therefrom; that said poles and wires interrupt him in the cultivation of his said land, and the ingress and egress and regress of his several pieces of land and the different parts thereof, and prevent the free use and enjoyment of said land by plaintiff, and essentially interfere with the comfortable enjoyment of his said property; the continuance of said poles on plaintiff's land may and will create a multiplicity of suits and continued and repeated litigation. Wherefore plaintiff demands judgment for one thousand dollars, and that defendants be enjoined from continuing their said poles on and said wires over the plaintiff's said land, or to abate them and enjoin any further erection thereof, and to enjoin them from the use and appropriation of plaintiff's land, and all proper relief."

The general denial was struck out, and the only answer was the following:

"2. And for a further and second paragraph of answer herein, defendants say that, in June of the year 1851, the Jeffersonville Railroad Company, then locating and constructing her railroad from Jeffersonville, Indiana, to Columbus, Indiana, entered upon, located and constructed her said road over, through and upon said real estate of plaintiff; and plain-

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tiff made no demand for damages for said appropriation of property within two years after the taking of said property, as aforesaid, nor has he since made such a demand; and said railroad was constructed from Jeffersonville to said Columbus; and defendants say that the width of the said Jeffersonville Railroad and right of way thereof over and through said real estate of said plaintiff was, by virtue of the charter of said company, at the time of said appropriation, and now is, sixty feet, and the track of said road was constructed and is on and over the center of said right of way.

“On the — day of April, 1866, the said Jeffersonville Railroad Company and the Madison and Indianapolis Railroad Company, then owning and operating a railroad from Madison, Indiana, through said Columbus to Indianapolis, Indiana, by proper articles of association, which were recorded in all the counties through which said road ran, consolidated and became one corporation, by the name of the Jeffersonville, Madison & Indianapolis Railroad Company, the defendant; whereby the said last named corporation became and was and is the owner of all the property, rights and franchises of said two corporations, including said road and right of way through and upon said real estate of plaintiff.

“Thereafter, to wit, on the — day of December, 1869, the defendants, the Western Union Telegraph Company and the Jeffersonville, Madison & Indianapolis Railroad Company, entered into an agreement, which is still in force, whereby, in consideration that the said railroad company would furnish the right of way for telegraphic lines along said railroad, over the road and right of way of said railroad company, the said telegraph company would construct and keep in repair telegraph lines along said road, and furnish one wire for the exclusive use of said railroad company; and, in pursuance of said agreement, said telegraph company constructed telegraph lines along the whole length of said roads, over and above said roads and the rights of way thereof, and furnished said wire for said use of

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said railroad company. Said telegraph line was constructed, as aforesaid, and it was in the construction and repairs thereof that said acts complained of in said complaint were committed, and no act was done other than was necessary for the construction and repair thereof, and for the safety of the same, and for the safety of the railroad track, and the successful and proper use of the telegraph line for the purpose of its construction and use as aforesaid. And said telegraph poles, when erected and when the line was repaired over and through the land described in the complaint, were erected and the line repaired upon ground within the sixty feet of ground through said lands owned for the purposes aforesaid by the said railroad company, and not outside thereof; and the defendants other than said corporations did no other act in the premises than to assist in said work, at the instance of said corporations.

“And defendants say that years, to wit, ten years, previous, and up to the time complained of, defendants’ said corporations had erected and continuously used said telegraph line on said land, ten poles thereof being planted within said sixty feet, but nearer to said railroad track, all without objection on the part of plaintiff; and at the time complained of they were removed a sufficient distance from said track, and no further, but within said sixty feet, to prevent the poles from falling upon and obstructing the track of said road in the event of falling or being thrown down by winds or storms.

“And it is further averred, that said railroad company has telegraph offices along said line of said road at the various offices and stations thereof, connected with said wires and telegraph lines, by and through which the business of said railroad is, in a great measure, transacted, and the use of said telegraph lines, as aforesaid, by said railroad company, is necessary and essential to secure the proper speed and safety of trains, they being run by telegraph, and were so run when said contract was entered into and the acts complained of were perpetrated. And the use of said telegraph lines, as

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aforesaid, are necessary and essential to secure dispatch, efficiency, safety and precision in the transaction of all the business of the said railroad.”

The reply was as follows :

“1. The plaintiff, for reply to second paragraph of answer herein, says that he admits that said Jeffersonville Railroad Company was organized by charter of the legislature of the State of Indiana, which authorizes said company to appropriate so much land as may be necessary to construct said road; that said company did not seize and appropriate sixty feet in width of said land, and the same was not necessary to said road, or useful in its construction, but it appropriated and took possession of only so much of said land as is actually occupied by the track of said company, which is about four feet in width, but a single track and no switches, and no other structures of any kind thereon, except on the west side of said road, nineteen feet from the center of said track, the said railroad company had erected telegraph poles and placed wires thereon for the use of said company, and used the same from the time of constructing said road; but defendants erected the poles complained of in complaint on the east side of said railroad track, as averred therein, without right, twenty-nine feet from the center of the track, and said company has at no time held or possessed or appropriated any other portion of said land under said charter.

“That said track of said railroad passes over the plaintiff’s land as aforesaid, but said plaintiff has at all times exclusively possessed and occupied all said land on either side of said railroad track and has fenced the same from time to time up to the track as the same was necessary for plaintiff’s use, and has had the entire and undisputed control and management thereof. He admits that on the — day of —, 1866, the said Jeffersonville Railroad Company consolidated with the Madison & Indianapolis Railroad Company, and then and there created a new corporation under the general railroad law of the State of Indiana, by the name of the Jeffersonville, Madison & Indianapolis Railroad Company;

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that all rights asserted and acquired by the said Jeffersonville Railroad Company, under its said original charter, passed by the consolidation to said new organization; that the only right it acquired in and to the plaintiff's land, by virtue of said original charter, was to that portion actually possessed, occupied and appropriated by said company prior to and at the time of said consolidation, and no more passed to said new corporation; that all said land was owned, possessed and occupied by plaintiff up to the irons making the railroad track; that said defendants planted, erected and have maintained their said telegraph poles, at the time and in the manner averred in the complaint, on the east side of said track, twenty-nine feet from the center of said track on plaintiff's land, on a portion of land at all times possessed, occupied and cultivated by plaintiff, without first assessing and tendering to plaintiff his damages as required by the law and constitution of the State of Indiana; that said railway company has at no time ever assessed or tendered to plaintiff any damages for the occupation of his land, and no other person or company has ever done so, and the plaintiff has not deeded or otherwise transferred said land to defendants, or either of them; that said railroad company, or other company or person other than plaintiff, has at no time occupied said land wherein said poles were planted, but the same has at all times been owned and adversely possessed and occupied by plaintiff.

"2. The plaintiff, for reply to the second paragraph of answer herein, says that he admits that the origin of the Jeffersonville Railroad Company was under a charter passed by the legislature of the State of Indiana, approved January 20th, 1846, section 14 of which provides, 'that the president and directors of said company shall be, and they are hereby invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, not exceeding sixty feet wide, with as many set of tracks as the said presi-

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dent and directors may deem necessary; and that they may cause to be made, or contract with others for making said railroad or any part of it, and they, their agents or those with whom they may contract for making any part of the same, or their agents, may enter upon and use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road or for any other purpose necessary or useful in the construction or repair of said road, or its works,' etc.; and section 15 thereof provides, that if said company and the owner of the land cannot agree about the land sought by said company, application may be made to any justice of the peace in the county where such lands may be, who shall thereupon issue his warrant directed to the sheriff of the county requiring him to summon a jury of twenty inhabitants to meet on the land, twelve of whom shall be selected as jurors, to whom the sheriff shall administer an oath that they will justly and impartially value the damages which the owner will sustain by the use or occupation of the land, and the jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by the sheriff to the clerk of the circuit court of his county, which shall be confirmed by the circuit court at its next session, if no sufficient cause to the contrary be shown, and when confirmed to be recorded by the clerk; and such valuation, when paid or tendered to the owner of said property, shall entitle the said company to the estate and interest in the same, thus valued, as fully as if it had been conveyed.

“That at the time of making said charter, plaintiff was the owner in fee of said land set forth in complaint, and has been continually since; that said Jeffersonville Railroad Company did not, and no other corporation or person has ever at any time assessed and tendered or paid plaintiff any damages or compensation for said land, or any portion thereof, or interest therein, but plaintiff avers that, by consent and verbal license, he authorized said railroad company to use and occupy so much of his said land as would be

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necessary to run a single track of their railroad thereon, about four feet in width, without switches or other structures thereon, and to erect for the use of said road telegraph poles along said track on the west side thereof, with telegraph wires thereon; and the plaintiff never, at any time, gave said railroad company or other corporation or person license to occupy more ground than as aforesaid, and said Jeffersonville Railroad Company did not at any time hold, possess, occupy or appropriate any other portion of said land under said charter, and said railroad company did not possess or otherwise hold the same than by the verbal license of the plaintiff. And plaintiff has at all times exclusively possessed, occupied and cultivated all said land, and fenced the same on the east side of said track up to said railroad track, and on the west side up to said telegraph poles, originally erected by said company for its own use, and plaintiff has at all times had the entire and undisputed control and possession thereof, and plaintiff has at no time licensed, released, or otherwise granted to said railroad company, or other corporation or person, said land or any other portion thereof, or any interest therein, except as aforesaid.

“He avers that said railroad company, organized as aforesaid, never did possess or appropriate any more of plaintiff’s land than that occupied by a single track of its road, which is about four feet in width, and the space actually occupied by the said telegraph poles on the west side of said track, at intervals of considerable space, about four feet from the said track; and this was by plaintiff’s verbal license; that said railroad company never did possess or appropriate sixty feet in width of plaintiff’s land, and so much was not necessary for the construction of said road.

“He avers that on the — day of —, 1866, said Jeffersonville Railroad Company, organized as aforesaid, consolidated with the Madison and Indianapolis Railroad Company, and then and there created and organized a new corporation under the general railroad law of the State of

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Indiana by the name of the Jeffersonville, Madison and Indianapolis Railroad Company.

“That the said Jeffersonville Railroad Company, or the Jeffersonville, Madison and Indianapolis Railroad Company, or other corporation or person or persons, never did occupy, possess or appropriate more than nine feet in width of plaintiff’s said land, which is set forth above, until on the —— day of ——, 1870, said defendants attempted, as averred in the complaint, to plant telegraph poles and erect four wires thereon—one wire for the use of said railroad and three for the use and profit and emolument of said telegraph company—on the east side of said railroad track, twenty-nine feet from the center of said railroad track, on plaintiff’s said land, at a point which plaintiff owned in fee simple, prior to the making of the said charter to the said Jeffersonville Railroad Company, and has ever since continued to own, adversely occupy, and exclusively possess, and which said railroad company and no other company or person ever attempted, prior thereto, to appropriate.

“That said planting of said telegraph poles and other acts averred in complaint were on plaintiff’s land, outside of any land that had ever been heretofore appropriated or occupied by said railroad company under said charter, by virtue of said license; that said defendants planted, erected, and have sought to maintain their said telegraph poles with wires thereon, along said track, and twenty-nine feet from the center of said railroad track, on the east side thereof, on plaintiff’s said land, at all times exclusively owned, adversely possessed, held, occupied and cultivated by him, without first assessing and tendering to plaintiff his damages as required by the law and constitution of the State of Indiana; and plaintiff has at no time released, conveyed, or otherwise transferred said land or any portion thereof, or any interest therein, to defendants, or either of them, or consented to any occupation of said land; but said attempted appropriation of said land was and is wrongful and without right; and plaintiff demands judgment.”

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The errors assigned are the sustaining of the demurrers to the first and second paragraphs of the reply, and the overruling of the demurrer to the answer.

Three questions are discussed by counsel:

1. The width of the right of way acquired by the Jeffersonville Railroad Company.

2. The character of the interest of the company in the right of way, whether a fee simple or a mere easement.

3. If a mere easement, was it of such a character as warranted the erection of the telegraph poles in question within the width of the right of way?

The first question presented by the record is, whether the court erred in overruling the demurrer to the second paragraph of the answer. The material part of said answer is in these words:

“2. And for a further and second paragraph of answer herein, defendants say that in June of the year 1851, the Jeffersonville Railroad Company, then locating and constructing her railroad from Jeffersonville, Indiana, to Columbus, Indiana, entered upon, located and constructed her said road over, through and upon said real estate of plaintiff; and plaintiff made no demand for damages for said appropriation of said property within two years after the taking of said property, as aforesaid, nor has he since made such a demand; and said railroad was constructed from Jeffersonville to said Columbus; and defendants say that the width of the said Jeffersonville Railroad and right of way thereof over and through said real estate of said plaintiff was, by virtue of the charter of said company, at the time of said appropriation, and now is, sixty feet, and the track of said road was constructed and is on and over the center of the said right of way.”

The answer proceeds upon the theory that the charter under which the appellee was organized granted a right of way sixty feet in width, without any act on her part declaring how much was necessary for the construction and repair of her railway, and without defining the width desired

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to be appropriated, and that an actual occupation of any part of appellant's land gave to the company sixty feet in width.

It becomes necessary that we should institute an inquiry into what rights were created and what powers were conferred by the charter of the appellee.

A portion of the fourteenth and fifteenth sections of the original charter are set out in the reply, but it is necessary that they should be set out in full. They are as follows (Local laws of 1846, pp. 156 and 157):

"Sec. 14. That the president and directors of said company shall be, and they are hereby invested with all the rights and powers necessary for the construction and repair of a railroad from the town of Jeffersonville, near the falls of the Ohio, to the town of Columbus, in the county of Bartholomew, not exceeding sixty feet wide, with as many set of tracks as the said president and directors may deem necessary; and that they may cause to be made, or contract with others for making said railroad or any part of it, and they, their agents or those with whom they may contract for making any part of the same, or their agents, may enter upon and use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road, or its works; and that they may build bridges, provided the same do not obstruct the navigation on navigable streams; may fix scales and weights; may lay rails; may take and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of said road or any part of its works, and may make and construct all works whatsoever, which may be necessary and expedient, in order to the proper completion of said road.

"Sec. 15. That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, or stone, or other materials, or any improvements which may be wanted for

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the construction or repair of any of said road, or any of their works, for the purchase, or use and occupation of the same; and if they cannot agree, and if the owner or owners of any of them be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace in the county where such land or materials shall lie, who shall thereupon issue his warrant, under his hand and seal, directed to the sheriff of said county, requiring him to summon a jury of twenty inhabitants of said county, not related or in any wise interested, to meet on the land or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same; and if, at said time and place, any of said jurors summoned do not attend, the said sheriff shall summon immediately as many jurors as may be necessary with the jurors in attendance, to furnish a panel of twenty jurors in attendance; and from them each party, its, his, or her, or their agent, if either be not present in person or by agent, then the sheriff, for it, him, or her, may strike off four jurors, and the remaining shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them an oath, or affirmation, as the case may be, that he will justly and impartially value the damages which the owner or owners will sustain, by the use or occupation of the land, materials or other property required by the company; and the jury estimating such damages, shall take into the estimate the benefit resulting to the owner or owners from the construction of the said railroad through, along or over the property of said owner or owners; but only in extinguishment of the claim for damages; and the jury shall reduce their inquisition to writing and shall sign and seal the same, and it shall then be returned by the said sheriff to the clerk of the circuit court of his county, and by such clerk filed in his office, and shall be confirmed by the circuit court of said county at its next session, if not sufficient cause to

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the contrary be shown; and when confirmed shall be recorded by said clerk, at the expense of said company; but if set aside by said court, for good cause shown, the said court shall direct another inquisition to be taken in the same manner as above prescribed; and such inquisition shall describe the property taken or the bounds of the land condemned; and the quantity or duration of the interest of the owner or owners in the same, valued for the company; and such valuation, when paid or tendered to the owner or owners of said property, or his, or her, or their legal representative, shall entitle the said company to the estate and interest in the same, thus valued, as full as if it had been conveyed by the owner or owners of the same; and the valuation if not received when tendered, may at any time thereafter be received from the company, without cost, by the owner or owners, his, her, or their legal representative or representatives."

The fifteenth section authorizes the company, through her officers and agents, to agree with the owner of land or material for the purchase, use or occupation of the same, and if they fail to agree in reference thereto, provision is then made for the assessment of damages, in which the company is required to take the initiative. It is then provided, that such inquisition shall describe the property, or the bounds of the land condemned, and the quantity or duration of the interest of the owner or owners in the same, valued for the company; and such valuation, when paid or tendered to the owner or owners of said property, or to his or her or their legal representative, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same, etc.

It is agreed in the briefs of counsel, that no steps were taken by the appellee, under the above section, to appropriate the lands of appellant, and that before the appellee took possession of such lands her charter was amended and materially changed. On the 15th day of January, 1849, an

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amendatory charter was passed, the third and fifth sections of which have an important and controlling bearing upon the questions involved in the present case; for it was under the amended charter that the lands of appellant were taken possession of, and the respective rights of the parties are to be determined by the amended charter, when construed in connection with the original charter.

The third section of said act reads as follows:

“Sec. 3. It shall be lawful for said railroad company to take, hold, sell and convey any and all lands and tenements which may be conveyed or granted or released to said company for the purpose of constructing and keeping in repair the work authorized by the act incorporating the Ohio and Indianapolis Railroad Company, referred to in the first section of this act: Provided, such company shall, within ten years from such grant or conveyance, sell or dispose of all such lands as may be so granted, conveyed or released, except so much as may be embraced in the width of the road allowed by charter and for depot grounds and water stations for said road, and an additional amount, not exceeding three thousand acres, which said company may retain and possess for the purpose of supplying timber and stone for the construction and use of said road.”

The fifth section of the amended charter is as follows:

“Sec. 5. For the purpose of constructing said road, with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, said company are hereby authorized to enter upon, take and hold in fee simple, all real estate and materials necessary for that purpose, doing no unnecessary damage, and when such real estate or materials cannot be had by donation or fair purchase, the owner may file his claim for damages in the office of the secretary of the company, and select an arbitrator, whereupon the company shall select another, and these two a third, who shall be disinterested men, and, within a reasonable time, having been sworn, they shall proceed to examine the case, and make out and file their award in the

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premises with said secretary, from which award either party may appeal to the circuit court of the county where the secretary keeps his office; which appeal shall be in all things regulated and tried as appeals are from the judgment of a justice of the peace in this State; said secretary being regarded as such justice in this behalf, and whenever [any] real estate is so taken, or is damaged, the arbitrators, court or jury trying the case shall estimate any and all advantages said road may be to the other real estate of the claimant adjacent or contiguous to that taken, deduct such advantages from the damage done, and find for the claimant the balance only, if any there be; if there be none, the claimant shall pay all costs; if damage be recovered, the company shall pay the cost; and that all claims for damages shall cease unless applied for in two years next after the property shall have been taken possession of by said company."

There is no express repeal of any portion of the original charter in the amendatory act. If there is any repeal it is by implication.

In the fourteenth section of the original charter, the word "necessary" is limited by the use of the qualifying words, "not exceeding sixty feet wide." In the fifth section of the amended charter, there are no such qualifying words, and the question arises whether such omission is to be construed into a repeal of the fourteenth section of the original charter, so far as it limited the width of the right of way to sixty feet.

It is a settled rule of construing statutes, that one part of an act of the legislature may be referred to in aid of the interpretation of other parts of the same act. So in case of doubt or uncertainty, acts *in pari materia*, passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the legislature in the use of particular terms; and, within the same rule and the reason of it, contemporaneous legislation, although not precisely *in pari materia*, may be referred to for the same purpose. Statutes *in pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and

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are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and they are intended to be harmonious and consistent. They are to be taken together, as if they were one in law, as one statute. 1 Kent Com. 463; *Church v. Crocker*, 3 Mass. 17; *Mendon v. County of Worcester*, 10 Pick. 235; *United Society v. Eagle Bank*, 7 Conn. 456; Bacon's Abr., tit. Statute, I. 3; *McWilliam v. Adams*, 1 Macq. Ap. Cas. 120; *Rogers v. Bradshaw*, 20 Johns. 735; *McCartee v. Orphan Asylum Society*, 9 Cow. 437.

It is provided in the third section of the amended charter, "that said company shall, within ten years from such grant or conveyance, sell and dispose of all such lands as may be so granted, conveyed, or released, except so much as may be embraced in the width of the road allowed by charter and for depot grounds and water stations for said road." Construing the third and fifth sections of the amended charter in connection with the fourteenth section of the original charter, we think it is quite obvious that the legislature did not intend to enlarge the width of the right of way as defined by the original charter. The views above expressed are greatly strengthened by the whole current of legislation in this State regulating the exercise of the right of eminent domain, which uniformly fixes a limit to the width of the right of way. We cannot assume that the legislature intended, by the fifth section of the amended charter, to authorize the appellee to secure a right of way without a limit as to the quantity to be taken except the necessities of the company. We are, therefore, of opinion that when the appellee entered upon and took possession of the land of the appellant, she had the right to appropriate whatever quantity was necessary for the construction, repair and operation of her road, not exceeding sixty feet in width.

By the fifteenth section of the original charter, the company was authorized, by her agents, to agree with the owner or owners of land, earth, timber, gravel or stone, or other

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materials, or any improvements which may be wanted for the construction or repair of any of said road or any of their works, for the purchase or use or occupation of the same. It is further provided that if the agent of the railway company cannot agree with the owner or owners of such land and materials, such company might institute proceedings for the condemnation of such land and materials, and the assessment of the damages occasioned by such appropriation, and that such inquisition should describe the property taken or the bounds of the land condemned, and that such valuation when paid or tendered should entitle the company to the estate and interest therein as fully as if it had been conveyed by the owner or owners thereof. By this section the company was authorized to contract for the purchase or use or occupation of land and materials; and if not thus acquired, the company obtained no title to or the right to appropriate such land or materials until the same had been condemned, the damages assessed, and paid or tendered. By such section there were three ways in which the company was authorized to acquire a title to and the right to use land and materials:

1. By purchase.
2. By contract for use or occupation.
3. By condemnation, assessment of damages and the payment or tender thereof.

When acquired in the last mode, the estate and interest of the company in such land or materials would be as full as if the same had been conveyed by the owner.

By the fifth section of the amended charter, the company was, for the purposes of constructing her road with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, authorized to enter upon, take and hold in fee simple all real estate and materials necessary for that purpose; and when such real estate and materials could not be had by donation or fair purchase, the owner was authorized to have the damages assessed in the mode therein pointed out. It was further

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provided that all claims for damages should cease unless applied for in two years next after the company had taken possession thereof.

By the above section there were three modes in which the company could acquire real estate and materials for the purposes therein specified:

1. By donation.
2. By fair purchase.
3. By taking possession of and using the same for the purposes therein specified.

The title of the railway company to the land in controversy was acquired in the mode last pointed out. The company by her agents entered upon, took possession of, and constructed her road-bed over the lands of the appellant with his acquiescence and without condemnation or assessment of damages, and the question which we are required to decide is as to the extent of the interest which the company acquired in the lands of the appellant. It is earnestly contended by counsel for the railway company, that by entering upon and constructing her road-bed over such lands, she acquired a strip of land sixty feet wide. We cannot give our assent to the doctrine contended for. If the company had acquired her title by purchase, or donation, or by a contract for use and occupation, or by condemnation under the fifteenth section of the original charter, the land would have been described and its bounds fixed, and the company would have acquired a paper title, which would have settled and fixed the rights of the parties. The fact that the charter provides that the company might acquire, in one of the modes above pointed out, whatever land was necessary, not exceeding sixty feet in width, necessarily creates the implication that the legislature supposed that less than sixty feet would answer the purposes of such company. If the company had taken possession of and occupied sixty feet in width, there can be no doubt that she would have acquired title to the whole of the strip so occupied; but having appropriated and used less than sixty feet, the extent of her right must be lim-

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ited by her necessities to the extent that she had possessed, occupied and used the same.

On the other hand, it is contended by counsel for appellant, that the company appropriated and took possession of only so much of his land as is actually occupied by the track of said road, being about four feet in width, and the space occupied on the west side of said track by telegraph poles, which were set nineteen feet from the center of said track, and had been maintained there from the construction of said road until the grievances complained of in the complaint were committed; in other words, that the only right which the company acquired in and to the appellant's land was to that portion actually possessed, occupied and appropriated by said company prior to and at the time of the consolidation of said companies, and that no more passed to such new corporation. The position assumed by counsel for appellant is as untenable as that taken by counsel for appellee, and cannot be maintained. The purposes for which the company was authorized to appropriate lands are specified in the fifth section of the amended charter, and they are:

1. For constructing said road with all desirable appendages.
2. For putting and keeping the same in repair.
3. For doing all proper business thereon.

It is well settled that the taking of private property for a public use must be limited to the necessity of the case, and, consequently, no more can be condemned and appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the need of that part will not justify the taking of the whole, though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain. For public uses the government has the right to exercise its powers of eminent domain and take private property, giving just compensation; but for

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public convenience, it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication. But statutes granting these powers are not to be construed so literally or so strictly as to defeat the evident purpose of the legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. Cooley's Const. Lim. 540 to 557; *The Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *The New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Concord Railroad v. Greely*, 17 N. H. 47; *The Memphis Freight Co. v. Mayor, etc.*, 4 Cold. Tenn. 419; *State v. Noyes*, 47 Maine, 189; *The Proprietors, etc., v. N. & L. R. R. Co.*, 104 Mass. 1; *In re Albany Street*, 11 Wend. 149; *Lance's Appeal*, 55 Penn. St. 16; *Gray v. The Liverpool & Bury R. W. Co.*, 9 Beav. 391; S. C., 4 Railw. Cas. 235; *Currier v. M. & C. R. R. Co.*, 11 Ohio St. 228; *Waldo v. The Chicago, etc., R. R. Co.*, 14 Wis. 575; *Vermont & Canada R. R. Co. v. Vermont Central R. R. Co.*, 34 Vt. 2.

This leads us to inquire what is meant by the word "necessary" as used in both the old and new charters. We have seen that the company possessed no power to appropriate lands for public convenience, but that it must be necessary for the purposes for which it was created.

The fifth section uses the words "with all desirable appendages." The word "desirable" should be construed to mean "necessary." Then what appendages are necessary for the construction, repair and operation of a railroad? Redfield on Railways, vol. 1, sec. 68, p. 261, says:

"By the English statutes, railway companies may not only purchase land for the purpose of the track, but also for all such extraordinary uses as will conduce to the successful

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prosecution of their business. This includes the site of stations, yards, wharves, places for the accommodation of passengers, and the deposit of freight, both live and dead, and for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings and conveniences."

In *The N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546, it is said: "The only limit to the former is the reasonable necessity of the corporation in the discharge of its duty to the public. The right to take lands upon which to erect a manufactory of cars, or dwellings for operatives, is not included in the grant; such purposes are not legitimately and necessarily connected with the management, the running and operating of the railroad. (*Eldridge v. Smith*, 34 Vt. 484; *Brainerd v. Peck*, 34 Vt. 496.) Neither can lands be taken for a mere subsidiary or extraordinary purpose. But passenger depots, convenient and proper places for the storing and keeping cars and locomotives when not in use, proper, secure and convenient places having reference to the public interests to be subserved, for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad, to the proper prosecution of the business in the interests of the public. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant."

In the case of *Reed v. Louisville Bridge Company*, 8 Bush, 69, the court say: "The third section of the act of incorporation gives to the company the right to extend a railroad over their bridge, with as many sets of tracks as may be deemed expedient. The right to have and operate a railroad necessarily implies the right to keep the necessary depots for the transaction of the business of such road, and such lands as may be necessary for the erection of the depot houses can be acquired by condemnation, under the pro-

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visions of the second section of said act. But it is clear to us from the language of the grant that the company has the legal right to acquire title by condemnation to no lands except such as are 'necessary' for the erection of their bridge, the construction of their railroad, and the transaction of such business as legitimately grows out of these two improvements, and for such suitable avenues as are designated in their charter. This necessity must exist as a condition precedent to their legal right to resort to the remedy given them to be enforced by the writ of *ad quod damnum*. Of the existence of this necessity the company is not to be the judge. It must be ascertained by a competent tribunal, before which the parties whose lands are sought to be taken, as well as the company, can be heard."

We proceed to make an application of the principles enunciated in the foregoing cases to the case in judgment. It is conceded that the company was entitled to a strip of ground wide enough to construct her track, but it is denied that she was entitled to any more. The road-bed is indispensably necessary to the construction of a railroad, but a railroad cannot be kept in repair and successfully operated with a strip of ground only wide enough for the track. There must be a strip of ground on each side of the track wide enough for the use of the men engaged in repairing the track, without trespassing upon the lands of adjoining owners. A wider strip of ground is required in the construction of the track in some places than in others. In some places, the ground being level, there are neither excavations nor embankments, but where these are rendered necessary a much wider strip of ground becomes necessary. Where there are excavations, the banks must be sloped upwards, and in the case of an embankment the base must be much wider than the top. So there can be no uniform rule as to the quantity of ground required for the construction of the track. There are several necessary appendages to the track itself. There must be in many cases drains or ditches to carry off the water and keep it off the track. The laws of

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this State do not affirmatively require railroad companies to fence their tracks, but they impose a heavy penalty for failure to do so. All experience demonstrates that the safety of passengers and freight requires that all railroad tracks should be fenced, and that the fence should be some distance from the track. A railroad cannot be safely and successfully operated unless water-tanks and wood or coal yards are placed at convenient places along the line and near the track, so that engines may be supplied with water and fuel. Experience has demonstrated that no railroad of any considerable length can be safely and efficiently operated without the use of a telegraph, and this requires the erection of telegraph poles at a safe distance from the track. Side tracks and turn-tables are necessary appendages to a railroad; and so are depots for passengers and freight and stock-yards. The appellee was entitled under her charter to have acquired, by donation, purchase or condemnation, the necessary quantity of ground for the above purposes, not exceeding sixty feet. If land had been acquired in either of the above modes, the quantity and boundaries would have been fixed. It is well settled that a corporation in condemning and appropriating private property for public use should, in some public and definite manner, describe the property, so that the respective rights of the owner and corporation should be clearly defined and definitely fixed, and this is also necessary to enable appraisers to assess the damages sustained by the owner of the land condemned. *Ligat v. Commonwealth*, 19 Penn. St. 456; *The Pennsylvania R. R. Co. v. Porter*, 29 Penn. St. 165; *The Pennsylvania Railroad Company v. Bruner*, 55 Penn. St. 318; *Heise v. The Pennsylvania R. R. Co.*, 62 Penn. St. 67.

It is quite obvious that the appellee acquired no title to the land in dispute by condemnation. The fifth section of the amended charter authorized the company to enter upon, take and hold all real estate necessary for the purposes therein specified. Both the charters were passed, and possession of the land in controversy was taken, while the con-

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stitution of 1816 was in force. Section 7, article 1, of that constitution provides, "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

This provision, unlike the corresponding provision in the existing constitution, did not require prepayment for the property appropriated. *Rubottom v. McClure*, 4 Blackf. 505; *Hankins v. Lawrence*, 8 Blackf. 266; *McCormick v. The President, etc.*, 1 Ind. 48; *Falkenburgh v. Jones*, 5 Ind. 296; *Dronberger v. Reed*, 11 Ind. 420; *Allen v. Jones*, 47 Ind. 438

Hence, it was competent for the legislature to authorize the appellee to appropriate the land of the appellant without first making compensation. Both constitutions require compensation to be made; but the present constitution requires compensation to be made or tendered before the appropriation. The appellee, by entering upon the land in dispute and constructing its track, did not acquire a right of way sixty feet in width. If it had been the intention of the legislature to definitely and unconditionally give a right of way sixty feet in width, it would have so said, instead of providing that it might acquire whatever was necessary, not exceeding sixty feet. It acquired the right of way for the track, and the right to make drains or ditches, fences, side-tracks, turn-tables, water-tanks, wood or coal yards, and depots for passengers and freight, and to erect telegraph poles, and, so far as this right was exercised, the appropriation for such purposes became complete, and gave it the right to use whatever ground was necessary for such purposes, and the intervening space between the track and the fixture or appendage erected. The company, having erected telegraph poles on the west side of the track, nineteen feet from the centre of the track, acquired the right to keep and maintain them there, and the right to the exclusive use of the ground between such poles and the track. But the company, having failed to erect poles on the east side of the track, or to

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occupy the same for any purpose but to keep the track in repair, for the period of about eighteen years from the time such land was appropriated, possessed no right to take possession of and erect telegraph poles, twenty-nine feet from the centre of the track. This was a new appropriation of the land of the appellant, which could not be done without condemnation and payment of damages in the mode prescribed by the general railroad law, if it was adopted when the two roads were consolidated; and if not so adopted, then in accordance with whatever law or charter the appellee is governed by.

It is firmly settled, that making one appropriation does not exhaust the power, but new appropriations may be made from time to time, as the necessities of a road may require. *Ligat v. Commonwealth*, 19 Penn. St. 456; *Kier v. Boyd*, 60 Penn. St. 33; *Water Commissioners v. Lawrence*, 3 Edw. Ch. 552; *The South Carolina R. R. Co. v. Blake*, 9 Rich. 228; *The Chicago, etc., R. R. Co. v. Wilson*, 17 Ill. 123; *The Toledo & Wabash R. W. Co. v. Daniels*, 16 Ohio St. 390.

In *The Toledo & Wabash R. W. Co. v. Daniels*, *supra*, the court say:

“Under almost precisely similar legislation, the Supreme Court of Illinois sustained the power sought to be exercised in this case—the power to appropriate land, long after the location and building of the road, for turn-outs, depots, engine-houses and turn-tables.

“In the case referred to—*Chicago, Burlington & Quincy R. R. Co. v. Wilson*, 17 Ill. Rep. 127—the court say:

““One of these (views) is, that the road itself having been actually completed and running, the power to condemn land, either for the track of the road or for depots or other appendages, is exhausted.

““In this view we cannot concur. It would be, indeed, a disastrous rule to hold that a railroad company must, in the first instance, acquire all the ground it will ever need, for its own convenience or the public accommodation. Here our railroads are built through extensive districts of country at

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present almost entirely unimproved, and which now afford no business whatever, but which are as fertile as any in the world, and which, ere many years have elapsed, will probably be peopled with an industrious and prosperous population, affording an immense business to the roads which pass through them. Probably not one-tenth of the land in the vicinity of this very road is now in cultivation; but no one acquainted with the subject can doubt that it is destined, at no distant day, to be brought into as high a state of productiveness as any of the older States. This will increase the population ten-fold, and may reasonably be expected to increase the business of the road in the same ratio, and hence there must be a corresponding increase of the rolling stock to do this increased business—requiring, also, a greater amount of machine shops for its repair, as well as an increase of depots and other necessary accommodations.

“We cannot suppose that it was the intention of the legislature to oblige the company to acquire all the land in the first instance, which, in any event, it should ever want to do the largest amount of business it may ever hope to attain. The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility.’ To which reasoning it may be added, that it is always the interest of the company to condemn and appropriate as largely as practicable at the time of constructing the road, as land is then comparatively cheap, and will almost certainly appreciate by the building and use of the road. There is much more danger that the company will appropriate too much ground, than that it will not appropriate enough, at the inception of its road.”

We do not deem it necessary, in view of the conclusion we have arrived at, to consider or pass upon the question whether the appellee acquired a fee simple to the land appropriated.

Having reached the conclusion that the railroad company had not acquired a title to the ground where the telegraph poles were placed, on the east side of the track, we have not deemed it necessary to consider or decide whether such com-

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pany possessed power to authorize the Western Union Telegraph Company to place the telegraph poles where they were placed.

Inasmuch as the second paragraph of the answer fails to show that the appellee acquired title to the land in dispute by purchase, donation or condemnation, and fails to show that it had occupied and used the land where the telegraph poles were erected, on the east side of said track, until the year 1869, when such poles were placed there, we are of opinion that it is bad, and that the court below erred in not carrying the demurrer to the reply back to the answer and sustaining the same thereto.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the answer, and for further proceedings in accordance with this opinion.

#### ON PETITION FOR A REHEARING.

WORDEN, J.—We have, on the petition for a rehearing, made some slight modifications in the opinion, as originally filed in this cause, not at all affecting the result. Having made these modifications, the petition for a rehearing is overruled.

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#### MCGILLIS ET AL. v. SLATTERY.

**PRACTICE.**—*Master Commissioner.*—*Report.*—By an agreement, entered of record, and an order of court thereon, a cause was submitted to a master commissioner, under the act of March 2d, 1853, 1 G. & H. 433, to report the evidence and his findings at the next term. He made a report which did not contain the evidence, though there was evidence given before him.

*Held*, that, for such failure to report the evidence as required, the report, upon exception and motion, should have been set aside.

From the Montgomery Circuit Court.

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*M. D. White, G. McWilliams, P. S. Kennedy and W. T. Brush*, for appellants.

PETTIT, J.—The appellee sued the appellants. Proper issues were formed, and as no question is raised as to the pleadings, we need not set them out or notice them further. Immediately after the issues were joined, the following entry appears in the record:

“And, by agreement, this cause is submitted to H. S. Braden, as a master commissioner, who is to report the evidence and his findings at the next term of this court.”

The master commissioner made a report, but did not report the evidence, as required by the agreement and order of the court. Exceptions were filed to the report, and on them a motion was made to set aside and reject the report. Among the exceptions to the report and reasons for setting it aside, one is that it does not contain or report the evidence as required by the order referring it to the master commissioner. The report of the master commissioner itself clearly shows that the evidence was not reported, as the agreement and order of the court required; and in addition to this the appellants offered to prove that a number of witnesses (naming them) were sworn, and testified before the master, who are not named or referred to in the report, and that certain written and documentary evidence was given and read before the master, which is not in the report or referred to by it.

The exceptions to and motion to set aside and reject the report were overruled, and the propriety of this ruling is properly before us.

We do not think that this was, or that it can be held to be, a reference to a referee under sec. 349, 2 G. & H. 210. There was no issue or issues referred to a referee to be tried, nor was there any written consent of the parties filed. But we think it was a reference to a master commissioner under the act of March 2d, 1853, 1 G. & H. 433, and as the agreement entered of record and the order of the court required that the evidence should be reported, which was

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not done, we hold that the exceptions to the report and the motion to set it aside should have been sustained. See *McKinney v. Pierce*, 5 Ind. 422.

The judgment is reversed, at the costs of the appellee, with instructions to set aside the report of the master commissioner, and for further proceedings.

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SHUBERT v. STANLEY ET AL.

**MORTGAGE.**—*Deed of Conveyance and Bond for Reconveyance.*—A deed of conveyance of real estate was made by a debtor to his creditor, and at the same time the latter executed to the former a title-bond, conditioned for the reconveyance of the land, if the grantor, within a certain time, should pay the amount of said indebtedness and interest thereon and the taxes on the land; otherwise the grantee should be put in full possession. Upon the death of the grantee, leaving no debts unpaid, his heirs, all being of age, divided his property among themselves without administration.

*Held*, that if the heirs of said grantee, by conveying said land, treated said transaction as a sale and conveyance, they or their assignee could not afterwards treat it as a mortgage.

*Held*, also, that if said grantor delivered up said title-bond to the heirs of the grantee, in consideration of the conveyance by them of a portion of said land to the son of the grantor, this was a confirmation of the original transaction as a sale, and said heirs or their assignee could not afterwards, by foreclosure, treat it as a mortgage.

From the Ripley Circuit Court.

*E. P. Ferris*, for appellant.

*Ward & Rebuck*, for appellees.

**BIDDLE, C. J.**—The complaint of the appellant alleges the following facts:

That on the 6th day of November, 1866, Aaron Ferris was the owner of certain lands described, ninety acres, more or less; that Ferris was indebted to Eli Murdock in the sum of two thousand one hundred and sixty dollars; that, to

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secure the payment of said indebtedness, Ferris, joined by his wife, executed a conveyance to Murdock of the lands mentioned; that at the same time, and as a part of the same transaction, Murdock executed to Ferris a title-bond for the same lands, conditioned "that, whereas Aaron Ferris and Julia Ferris, his wife, have this day conveyed to me the following lands," describing them, "for the sum of two thousand one hundred and sixty dollars, with the express condition that if the said Aaron Ferris shall regularly pay the taxes on said land, and pay me at the end of every six months ten per cent. interest per annum on the above amount, and also the whole amount of said purchase-money at any time within two years from this date, with the accrued interest thereon, then I am to execute and deliver to him, his heirs and assigns, a good and clear warranty deed for the hereinbefore described tract of land; provided always, that if the said Aaron Ferris at any time fails to pay the taxes on the said land or the interest on the principal as the same becomes due, then I am entitled to, and he shall put me in, full possession of the above described tract of land. Now, if all conditions are complied with as above stated, I shall fail to execute and deliver to the said Aaron Ferris, at his costs, a good and sufficient deed for the above described land, then this bond shall be in full force and virtue in law; otherwise to be void;" that said deed and bond were recorded together in the same book on the day of their date, amongst the deed records of Ripley county; that Eli Murdock died on the 11th day of February, 1869, leaving certain heirs at law, who are named and made defendants; that he left no debts unpaid; that no administration was had upon his effects, and that his heirs made an amicable partition among themselves of the real and personal property belonging to his estate; that on the 21st day of January, 1874, John Murdock, one of said heirs, assigned in writing all his interest in said claim to Sarah Murdock; and that on the 19th of January, 1874, the other heirs also assigned their interests, in writing, in said claim, to Sarah Murdock, who, on the 4th day of Feb-

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ruary, 1874, assigned the claim to the appellant. The deed, the bond, and the several assignments of the claim are made exhibits, and filed with the complaint; that in August, 1871, Aaron Ferris died, and that his wife Julia had died prior to the death of Aaron, whose surviving heirs are made parties defendants, and who are alleged to be the owners in fee of said lands; that said sum of two thousand one hundred and sixty dollars, with interest, remains wholly unpaid and due. Prayer, that the deed may be declared a mortgage, and foreclosed, for judgment, and general relief.

Certain of the defendants below were defaulted. After a demurrer filed to the complaint by Aaron Stanley, Emiline Stanley, and Samuel Neil, for the alleged want of facts, was overruled, and exception taken, they answered in two paragraphs, as follows:

1. That subsequently to the death of Eli Murdock, in the settlement of his estate, by and with the consent of all the heirs, who were at the time of full age, the claim of two thousand one hundred and sixty dollars, mentioned in the complaint, was set off to John Murdock, one of the heirs of Eli Murdock, as a portion of his share of the estate, and that all the heirs of said estate conveyed their right, title and interest in and to the said real estate described in the complaint to John Murdock; that afterwards John Murdock and wife conveyed the same to the appellant; that afterwards the appellant conveyed the same to Sarah J. Murdock; that afterwards Sarah J. Murdock conveyed the same, except twenty acres, to Milly A. H. Yater, who afterwards, in January, 1870, conveyed the same to Sarah E. McClure, who mortgaged the lands for the sum of one thousand five hundred dollars to the defendant Aaron Stanley; that as to the twenty acres not deeded to Milly A. H. Yater, Sarah Murdock, in September, 1869, conveyed the same to Moses Ferris, who in July, 1870, conveyed the same to the defendant Samuel Neil; that the only title Sarah Murdock ever had in said real estate was derived from the deed to the said Eli Murdock, as set forth in the complaint; and that plain-

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tiff had full knowledge of all the facts at the time he received the assignment of said claim from Sarah Murdock; wherefore, etc.

2. That after the death of Eli Murdock, his heirs, all being of mature age, divided his property among themselves, the claim sued on being taken by John Murdock, one of said heirs, as a portion of his share of said estate, and was assigned and set off to him by the other heirs of Eli Murdock; that after the transfer of said claim to John Murdock, and while Aaron Ferris was still in life, John Murdock, as agent for his wife, Sarah Murdock, entered into a contract with Ferris, by which Ferris was to cancel the bond held and owned by him, in consideration that Sarah Murdock should transfer to Moses Ferris, the son of Aaron, twenty acres of the land described in the deed named in the complaint, and that she should have and hold the title to the remainder of said land in fee simple; that, in compliance with the said agreement, Sarah Murdock conveyed by deed of warranty, in which her husband joined, twenty acres of the land to Moses Ferris, and the possession of the remainder of said land was surrendered to Sarah Murdock, who afterwards sold and conveyed all the land described in the complaint, not before transferred to Moses Ferris, to Milly Yater, who subsequently transferred the same to Sarah E. McClure by general warranty, and that all of said transfers took place before the assignment of the claim in suit by Sarah Murdock to the plaintiff herein; wherefore, etc.

A demurrer, for the alleged want of facts, was filed to each paragraph of the answer, and overruled. Exceptions, judgment on demurrer, and appeal.

It is contended by the appellant that the conveyance of the land by Aaron Ferris to Eli Murdock, and the bond of Murdock to Ferris to reconvey on certain conditions, constituted, together, only a mortgage to secure the debt due from Ferris to Murdock; and that the assignments set forth in the complaint transferred the claim to him; hence he has

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the right to recover. Doubtless, Aaron Ferris had the right to treat the deed and bond as a mortgage, and redeem his land by paying the debt secured thereby; and perhaps Eli Murdock, after condition broken, could also have treated them as a mortgage, and subjected the land to sale to discharge the debt; but neither party could have treated them both as a sale of the land and a mortgage to secure the debt, at the same time. The deed and bond constituted a sale or a mortgage, not both. The transaction was a sale upon its face, and would remain a sale until some one, having the power, would question it.

When the heirs of Eli Murdock assigned the claim to John Murdock and conveyed to him the lands by which it was secured, and John Murdock conveyed the land to appellant, as stated in the first paragraph of the answer, they treated the deed of Aaron Ferris to Eli Murdock as a conveyance of the land, and could not afterwards hold it as a mortgage. Whether the heirs of Aaron Ferris could still have treated the deed and bond as a mortgage, as against the heirs of Eli Murdock and their vendees, we need not decide, as the question is not made in the case. Nor need we decide whether Eli Murdock ever had any interest in the deed and bond, which could be transferred merely by assignment. He could not, by assigning the deed, pass the title of the land, and he could not assign his own bond, made to Aaron Ferris. Besides, there is no obligation on the part of Aaron Ferris to pay money to Eli Murdock, either in the deed or bond. If he desired to get his land back, he would have to pay the debt; if he did not, the transaction remained a sale. There is nothing in the deed or bond upon which Eli Murdock could have recovered a personal judgment against Aaron Ferris. The sole remedy of Eli Murdock, if he chose to treat the deed and bond as a mortgage, upon condition broken by Aaron Ferris, would have been against the land. 2 G. & H. 355, sec. 2. But whether Eli Murdock had originally any interest in the deed and bond which he could pass merely by assignment or not, we are very clear in our

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opinion that after his heirs had treated the transaction as a sale and accepted the land, they had no assignable interest left in the deed and bond as a mortgage. They could not keep the land which secured the debt, and afterwards collect the debt also; and if they had not this power, neither has their assignee. We think the appellant took nothing by the assignments set out in the first paragraph of the answer.

The facts alleged in the second paragraph of answer show that Aaron Ferris, in consideration of the conveyance of twenty acres of the land to his son, Moses Ferris, surrendered the remainder of the land to the representatives of Eli Murdock, and cancelled the bond. This transaction was a confirmation of the original conveyance to Eli Murdock by Aaron Ferris as a sale, by both parties, and took all the qualities of a mortgage out of the deed and bond. There was nothing left to transfer to the appellant. He therefore took nothing by his assignments.

The second paragraph of answer is good. There is no error in the rulings below.

The judgment is affirmed, with costs.

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MILLER v. THE WILD CAT GRAVEL ROAD CO.

**TURNPIKE.**—*Subscription of Stock.*—When the articles of association of a proposed gravel road company define the sum of the capital stock, the number of the shares, and the amount of each share, and stipulate that the subscribers thereto agree to take the number of shares set opposite their names, a promise is implied that each subscriber will pay the amount specified per share, as assessed after the organization of the company as a corporation shall be perfected.

**SAME.**—*Complaint on Subscription.*—*Articles of Association.*—*Where and When Recorded.*—A complaint on a subscription of stock in a gravel road company, which alleges that the articles of association were recorded in a certain county named, is not defective on demurrer, because it does not

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allege that said articles were recorded in the county through which the road was to pass, if an inspection of the termini and course of the road specified in the articles shows that the road was not to run elsewhere than in said county named. Nor is it ground of demurrer that such complaint alleges the articles of association to have been recorded in a certain year; if a more definite and certain time is required to be stated, a motion to make more specific is necessary.

**SAME.—Board of Directors.**—Where such complaint alleges that the calls were made by the board of directors of the company, it is not defective for not alleging that a board of directors was elected and qualified.

**SAME.—Articles of Association.—Names of Directors.**—The articles of association of a gravel road company, organized under the statute, 1 G. & H. 474, need not set forth the names of the directors of the company.

**SAME.—Terminus of Road.**—The terminus of a gravel road is sufficiently defined in the articles of association, if they state that the road starts from a definitely described point and runs specified courses and distances to the end.

**SAME.—Exhibit.**—A paper containing a description and survey of a gravel road, although detached from the body of the articles of association, yet is a part thereof, if it is referred to in the articles as a certain exhibit and is expressly made a part of them and is recorded as part thereof.

**SAME.—Steps Necessary to Incorporation.**—A complaint on a subscription of stock in a gravel road company organized under the statute (1 G. & H. 474) is not objectionable for not alleging, in terms, all the steps to have been taken which were necessary to bring the corporation into existence, if it alleges that certain articles of association, which are set out by copy as containing the contract, and which contain all that is required by law, were entered into by defendant, and, also, that the necessary amount of stock has been subscribed, and that the articles have been duly filed for record.

**SAME.—Tender of Certificates of Stock.**—It is not necessary for a gravel road company to tender certificates of the stock subscribed for before suing the subscriber, when it is not expressly stipulated in the contract that the stock is to be issued on the payment of the money.

**SAME.—Board of Directors.—Bond of.**—Section 7, 3 Ind. Stat. 540, requires the board of directors of a gravel road company to file a bond before the receipt by the company from the county treasurer of money collected on assessments of benefits; it has no reference to collections of stock subscriptions.

**SAME.—Designation of Place of Residence of Subscriber to Articles.**—The use of the double comma following the name of a subscriber of articles of association of a gravel road company, and under a certain named county and state designated by a heading as a place of residence, sufficiently indicates the place of residence of the subscriber to be that county and state.

**SAME.—Juror.**—Stockholders and directors of one gravel road company are

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competent jurors to try issues between another gravel road and third parties.

**SAME.**—It is not error for the court to overrule an objection to the competency of a juror based entirely upon the mere supposition and presumption by the juror of the existence of facts which might render him incompetent.

**SAME.**—*Evidence.*—Oral testimony may be given as to what was done to organize a gravel road company, but not to prove the contents of the articles of association.

**SAME.**—*Solvency of Subscribers.*—Under the statute for the incorporation of gravel road companies (1 G. & H. 474), the solvency or insolvency of the subscribers to the capital stock of the company is immaterial to affect the legality of the corporation.

**PRACTICE.**—*Appeal.*—*Objections to Evidence.*—The ground of an objection to evidence must be stated in the court below, and shown by bill of exceptions to have been so stated, or the objection will not be noticed on appeal.

**EVIDENCE.**—*Conversation.*—When a conversation is given in evidence, the opposing party is entitled to have all that was then said in relation to the same matter given in evidence; but where a conversation about a given matter is introduced in evidence, the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation.

**TURNPIKE.**—*False Representations.*—*Location of Road.*—*Agent.*—The representations of a solicitor of subscriptions to the stock of a gravel road company, made before the organization of the company, concerning the location of the road, and that the stock would not have to be paid for, do not bind the company, and their falsity is no defence, as a failure of consideration or otherwise, in an action by the company on the subscription of a person to whom such representations were made.

**ARREST OF JUDGMENT.**—*Interest of Judge.*—The interest of a judge in a cause is not ground for a motion in arrest of judgment.

From the Howard Circuit Court.

H. A. Brouse, for appellant.

C. E. Hendry, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant, as follows, viz.:

“The Wild Cat Gravel Road Company, for her amended complaint, complains of the defendant, Mathew W. Miller, and complaining says that on the 25th day of July, 1869, for the purpose of accomplishing the organization of a corporation, to be known by the corporate name of The Wild Cat Gravel

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Road Company, the defendant, with others, mutually agreed to and subscribed to the articles of association of this plaintiff, a copy of which articles of association and of the subscription thereto is filed herewith and made a part hereof, and marked exhibit 'A,' and agreed to take and pay for the number of shares of the corporate stock of the plaintiff, set opposite each of their names. That the defendant, by the terms of his subscription, agreed to take and pay for five shares of the capital stock of the plaintiff, amounting, in the aggregate, to the sum of two hundred and fifty dollars, and to pay the same as soon, and in such instalments, as the board of directors of the plaintiff might order, notice of such order first having been given in orders according to law.

"And the plaintiff further avers that afterwards, to wit, on the — day of —, 1869, having secured a valid and solvent subscription to her capital stock, amounting to more than five hundred dollars per mile of the gravel road proposed to be constructed, for the purpose of completing said organization, a copy of said articles of association were, on the day last aforesaid, caused to be filed in the recorder's office of the recorder of Howard county, in the State of Indiana, and recorded in the proper records in said office.

"Plaintiff further avers that on the — day of —, 1869, the board of directors of the plaintiff ordered thirty-three and one-third per cent. of said subscriptions to the capital stock to be paid to the secretary of the plaintiff, at his office, on or before the 11th day of January, 1870; that on the — day of —, 1870, said board of directors ordered thirty-three and one-third per cent. more of said subscription to be paid to the secretary of the plaintiff, at his office, on or before the 15th day of October, 1870; and on the — day of —, 1871, said board of directors ordered an additional thirty-three and one-third per cent. of said subscription to be paid to said secretary, at his office, on or before the 1st day of April, 1871; of all of which orders so made by said board, as aforesaid, due notices were given for at least thirty days before maturity of each of said instal-

ments so ordered to be paid as aforesaid, in the Howard Tribune, a weekly newspaper printed and published in the city of Kokomo, Howard county, in the State of Indiana.

“And the plaintiff further says that, notwithstanding the making of said orders, of all of which the defendant had due notice, so given as aforesaid, he has wholly neglected, refused and declined to pay said subscription, or any part thereof; that the same, with the interest thereon from the dates of the maturity of said instalments, is now due and remains wholly unpaid. Wherefore,” etc.

Demurrer to the complaint, for want of sufficient facts, overruled, and exception.

Answer, issue, trial by jury, verdict and judgment for the plaintiff, over a motion by defendant for a new trial.

The errors assigned are:

1. The overruling of the demurrer to the complaint.
2. The overruling of the motion for a new trial.
3. The overruling of a motion in arrest of judgment.

There are several objections made to the complaint, which we will consider in their order.

1. It is objected that the articles of association, signed by the defendant, did not contain any agreement to pay money to the corporation when she should become organized, or to any one else for her use; in other words, that there was no contract to pay for the stock. The amount of the capital stock of the association was fixed by the articles at twenty thousand dollars, divided into four hundred shares, of fifty dollars per share; and the defendant stipulated to take five shares. There is no express stipulation that he would pay for the shares the amount of fifty dollars per share, or any other sum; but it was clearly implied that he would pay the amount specified per share, from his agreement to take the shares. Angell & Ames Corp., 10th ed., sec. 517.

Another author says:

“Where the stock of the company is defined in its charter, and is divided into shares of a definite amount in money, a subscription for shares is justly regarded as equivalent to a

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promise to pay calls, as they shall be legally made, to the amount of the shares." 1 Redf. Railw., 5th ed., 175.

Here the amount of the capital stock was fixed by the articles of association, and the number of shares, as well as the amount of each share. This, for the purposes of this question, is the same as if the same thing had been done by special charter. The subscription inured to the benefit of the corporation, when its organization was afterwards perfected by filing a copy of its articles of association in the proper recorder's office. *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *The Indianapolis Furnace and Mining Co. v. Herkimer*, 46 Ind. 142.

There is no force in the objection we have been considering.

It is objected, in the second place, that "it is not alleged in the complaint that copies of the articles of association were filed in the office of the recorder of the county through which the road is to pass, and the time when filed."

It is alleged that a copy of the articles was filed in the recorder's office in Howard county, and an inspection of the termini and course of the road, as specified in the articles, shows that it was not to run elsewhere than in that county. There was, therefore, no need of recording the articles in any other county. The time at which the articles were filed for record is not stated, except that it was in the year 1869; but this uncertainty was not ground of demurrer, in view of all the allegations of the complaint. The uncertainty might have been removed by a motion to require the time to have been stated more specifically.

It is objected, in the third place, that it is not alleged that a board of directors was elected and qualified, to order the payment of subscriptions. It is alleged that the calls were made by the board of directors of the plaintiff. The allegations in this respect were, in our opinion, sufficient. It could not be true that the calls were made by the board of directors of the plaintiff, unless a board of directors had been elected.

The next and fourth objection is, that "no names of directors are set forth in the articles of association;" and the case of *Busenback v. The Attica and Bethel Gravel Road Co.*, 43 Ind. 265, is cited as holding it to be necessary that the names of directors should be thus stated in the articles. The case cited does not support the position. No such question was involved in the case. The only question there was, whether it was necessary that the articles should set forth the residence of each and every subscriber thereto. In the case above cited, the case of *Eakright v. The Logansport, etc., Railroad Co.*, 13 Ind. 404, was referred to as deciding that the requirements of the statute must be complied with, in order to effect an organization of a corporation. The case from 13 Ind. was decided under a statute that required the articles of association to state the number and names of the directors. The law under which the plaintiff was organized makes no such requirement. 1 G. & H. 474, sec. 1. There is nothing in this objection.

It is claimed, fifthly, that the terminus of the road is not stated with sufficient certainty. There is no force in this objection. The road starts at a definitely described point, and runs specified courses and distances to the end, the whole length being eleven miles and one hundred and thirty-seven and twenty-eight hundredths rods. Thus by starting at the point indicated and following the courses and distances, the exact terminus can be ascertained. That which can thus be rendered certain is sufficiently certain. The paper containing a description and survey of the road seems to have been detached from the body of the articles of association, but it was referred to in the articles as exhibit "A," and expressly made a part of them, and recorded with them as part thereof. The paper thus became a part of the articles, as effectually as if it had been contained in the body of them.

The sixth objection made is, that the complaint does not allege, in terms, that all the steps have been taken which were necessary to bring the corporation into existence. It

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alleges the entering into the articles of association, which are set out by copy as containing the contract entered into by the defendant, and they appear to contain all that is required by law. It also alleges that the necessary amount of stock has been subscribed for, and that the articles have been duly filed for record. This is all that was necessary to constitute the plaintiff a corporation. 1 G. & H. 474, sec. 1. No further allegations were necessary in this respect.

It is further objected that the complaint is bad, because it does not aver that certificates of stock were tendered to the defendant before bringing the action. No such tender was necessary. *The New Albany, etc., R. R. Co. v. McCormick*, 10 Ind. 499; *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *Beaver v. President, etc., of Hartsville University*, 34 Ind. 245.

The appellant has referred to the case of *Summers v. Sleeth*, 45 Ind. 598, as sustaining his position. That case, however, is not in point. In that case, it was expressly stipulated in the contract sued upon that, on the payment of the money, the company was to issue to the defendant the amount of the stock. The payment of the money and the issuing to the defendant of the stock (which we suppose means the issuing of a certificate for the stock) were held to be concurrent acts; and it was accordingly held that the action could not be maintained for the money without having tendered the stock. There is in the case before us no such stipulation.

The payment by the defendant of his subscription would entitle him to the stock. The certificate is merely the evidence of title, which can be demanded and obtained by the owner of stock whenever he may desire. See *The New Albany, etc., R. R. Co. v. McCormick*, *supra*.

It is also claimed that the directors of the company should have filed a bond before they proceeded to collect the money, and for this proposition we are referred to 3 Ind. Stat. 540, sec. 7. The statute cited has reference to the receipt by the company from the county treasurer of money

“Subscriber’s Names.	Place of Residence.	No. of shares taken.
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**"Mathew W. Miller, " " " " " 5."**

We have thus noticed all the objections made to the complaint, unless, in their multiplicity, we have overlooked some as they lie scattered through two briefs filed by the appellant.

Clark A. Boggs, one of the jurors, being interrogated as to his competency, said:

**"I am a stockholder in the Greentown and Kokomo**

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Gravel Road. My father resides in Kokomo, and owns real estate in said city, which I suppose has been assessed benefits in favor of all these roads, and in favor of the plaintiff's road. I presume if he had been assessed he has paid his assessment." On this statement the appellant objected to the juror, but the objection was overruled. This juror was a stockholder in another road, but this, as we have seen, did not render him incompetent. His father owned property in Kokomo, which he supposed had been assessed benefits in favor of the plaintiff. This, however, was a mere supposition. But, assuming that the juror's father had been thus assessed, he did not become a stockholder in the corporation, unless he had paid the assessment. It did not appear that he had paid the assessment. The juror said he presumed his father had paid the assessment, if he had been assessed. He did not profess to know anything about it. Assuming, without deciding, that if the juror's father had been assessed for benefits in consequence of the plaintiff's road, and had paid the assessment, the juror would have been incompetent, still the action of the court was not erroneous, because there was no legitimate proof either of the assessment or payment. It all rested on the mere supposition and presumption of the juror, which are not sufficient to establish any disputed fact.

On the trial, the plaintiff asked a witness, Isaac Houck, as follows:

"State what steps, if any, were taken to get up an organization of the company."

To this question the defendant objected, for the reason "that the question was too vague and indefinite, and solicited, if anything, evidence of a secondary character." Objection overruled. There was no error in this ruling. What the witness was asked to state was neither vague nor indefinite, nor does it seem to us to call out parol evidence of the contents of the articles of association.

The following question was asked the witness:

“Did you at any time, on behalf of the company, file articles of association with the recorder of Howard county?”

The witness answered that he did, and paid six dollars for recording them. This question and answer were objected to, but the objection was overruled. We see no objection to the question and answer, except, perhaps, that the question was leading. It is in the discretion of the courts below to sometimes allow leading questions to be put. This court will not reverse a judgment, because leading questions have been put, unless it plainly appears that the discretion of the court below has been abused. That does not appear in this case. We think it was competent to prove by parol the fact that the articles of association had been filed in the recorder's office.

On the trial, the plaintiff offered some evidence as to the solvency of the subscribers for stock at the time the articles were filed, and the defendant, at the proper time, offered to prove “that a considerable portion of the subscription to the capital stock of said company was, at the time above referred to, insolvent.” This evidence was rejected, the court remarking “that it was not necessary for the plaintiff to allege and prove the solvency of the subscribers to the capital stock of the company.”

The action of the court, in this respect, was right. The solvency or insolvency of the subscribers for stock is not made a question in the statute providing for the organization of such corporations. 1 G. & H. 474, sec. 1.

The statute enacts, that “whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation, known by the name assumed in [its] articles of association.”

There could be no other purpose, in offering the evidence rejected, than to show that the plaintiff had not become a legal corporation. The evidence did not tend to show that.

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The court was right in stating that the plaintiff was not bound to allege or prove the solvency of the subscribers. Although the plaintiff had offered evidence on the point, the court did not err in rejecting that offered by the defendant, because it went to an immaterial matter.

After examining a witness as to the loss of the original articles of association, the plaintiff offered in evidence what was claimed to be a copy thereof, certified to by the recorder of Howard county. This was objected to by the defendant, but admitted. The bill of exceptions does not show that any ground of the objection was stated or in any way pointed out. This point, therefore, need not be further noticed.

The bill of exceptions shows that the plaintiff called Isaac Houck as a witness, and proved by him a conversation between himself and the defendant, at the time the defendant subscribed for the stock. Afterwards, at the proper time, the defendant was sworn as a witness, and was asked by his counsel to state what representation was made by Houck, if any, in the conversation above mentioned, in reference to the location of the road. This evidence was objected to by the plaintiff, and the objection sustained.

We cannot say that this was error. It does not appear that the location of the road was any part of the subject of the conversation between the witness and the defendant, which had been given in evidence. For aught that appears, the location of the road was a matter entirely foreign thereto. When a conversation is given in evidence, the party is entitled to have all that was then said in relation to the same matter given in evidence. But where a conversation about a given matter is introduced in evidence, the door is not thereby opened for the introduction of what was said in relation to a different matter, although it was said in the same conversation. 1 Greenl. Ev., sec. 201, and note.

Viewing the evidence offered as unconnected with the conversation previously shown, we do not see that it was in any way material. It does not appear that the defendant was

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injured by its rejection, it not being shown what it was proposed to prove that Houck said.

In the general bill of exceptions, setting out the evidence, it is shown that the defendant, when testifying as a witness, "offered to prove that at the time Houck came to him, Miller, to get him to subscribe, he told Miller where the road was to be located, or would be located, and that the road was not located where Houck represented it would be; and that he told him he would be benefited by the road, that he would be assessed for benefits, and that he might just as well take stock to the amount that he would be assessed, and that if he did take stock, he would not have the subscription to pay."

This evidence, on the objection of the plaintiff, was rejected. This ruling was right. When the subscription was made, the company was not organized, and Houck could not bind the company by any representation that he could make as to where the road would be located. If the road was then already located, there is nothing in the case showing that the defendant had not the means of knowing the fact, and of ascertaining its exact location. He had no right to rely upon Houck's statement as to where it would be located.

The statement of Houck that, if the defendant subscribed for stock, he would not have the subscription to pay, assuming that he made such statement, could not have imposed upon the credulity of the most unsuspecting.

The plaintiff offered in evidence portions of the books of the company, for the purpose of showing the election of directors and the making of calls, but the defendant objected, and the objection was overruled. We do not find that any ground for this objection was pointed out.

It is objected that the charges given by the court were erroneous. This opinion has already extended to an unusual length, owing to the numerous points made, and we will not extend it further by setting out the charges. We think they

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were substantially correct. The evidence sustains the verdict.

It is claimed, as we understand the brief of counsel for the appellant, that as the road was not located where he was assured it would be, the consideration of his subscription has failed, and he is not liable. This is confounding motive with consideration. The motive of the defendant in subscribing may have been to secure a road where he supposed this was to be located. The consideration of his subscription was the stock to which the payment would entitle him. There has been no failure of consideration.

The motion in arrest of judgment was based upon the ground that the complaint was insufficient, and that the judge was interested as a stockholder in the road.

There was nothing in the ground first mentioned. The other formed no ground for a motion in arrest. If the judge was interested, proper steps might have been taken to secure a trial before another judge. 2 G. & H. 9, sec. 1; 2 G. & H. 154, sec. 207.

The judgment below is affirmed, with costs and ten per cent. damages.

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 RYCE v. RYCE.

PARENT AND CHILD.—*Divorce.—Custody of Children.—Revocation of Order.—*

*Practice.*—In decreeing a divorce, the court gave the custody and guardianship of a minor child of the marriage to the mother until the further order of the court, ordering, among other things, that she should not, without the consent of the court, permanently remove said child beyond its jurisdiction. Afterward, the mother filed a motion in said court to modify the decree so as to give her the custody of the child without condition or restriction as to her place of residence. The father filed an answer, or "cross motion," asking the court to revoke said order. The mother then withdrew her motion.

*Held*, that there was no error in refusing to dismiss the motion of the father upon the withdrawal of that of the mother.

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**SAME.**—The mother answered said motion of the father, and, upon the hearing, the court revoked said order, and gave the custody of the child to the father, which action the Supreme Court refused to disturb upon the evidence.

From the Vigo Common Pleas.

*D. W. Voorhees* and *A. B. Carlton*, for appellant.

*J. P. Baird* and *C. Cruft*, for appellee.

**DOWNEY, J.**—On the 12th day of May, 1871, the parties to this proceeding were divorced, on the ground that the appellee had failed to provide for his family. Until the further order of the court, the custody and guardianship of Lucius C. Ryce, the child of the parties, then about five years of age, were given to the appellant, and she was charged with his support. It was also ordered that the appellee should have the right, at all proper and reasonable times, to see and converse with the child; that, for this purpose, the appellant should permit the child to visit or be taken to the residence of his grandfather, Lucius Ryce, at reasonable times, and that the appellant should not permanently remove the child beyond the jurisdiction of the court, without the consent of the court, etc.

On the 28th day of August, 1871, the appellant filed a motion to modify the decree, so as to give her the custody of the child without any condition or restriction as to her place of residence.

On the 15th day of November, 1872, the appellee filed an answer to the motion of the appellant, which assumed the form of, and is denominated, a cross motion. In this he alleged that she had shown herself unfit to have the custody of the child; that she had neglected its education, had refused to permit the appellee to see it, had taken the child out of the jurisdiction of the court without leave of the court, and kept it away for more than a year; that she had permanently removed to another state, and was about to go to Europe, taking the child with her, and intending to remain for an indefinite period; that she was allowing the

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child to grow up in ignorance, to acquire vicious habits, and teaching it to hate appellee. He alleges his competency to have the custody of the child, and asks the court to revoke the order giving its custody to the appellant.

On the same day, the 16th day of November, 1872, when the cause was called, the appellant dismissed or withdrew her motion, and moved the court to dismiss the motion of the appellee, for the reason that the dismissal or withdrawal of her motion operated as a dismissal of the appellee's cross motion also. This motion the court overruled. The appellant then filed an answer to the cross motion of the appellee, consisting of a general denial and a special paragraph in which she alleged that the appellee was an improper person to have the custody of the child, stating the reasons therefor, and praying for the unconditional custody of the child.

Upon the hearing, the court revoked and set aside the order granting the custody of the child to the mother, and refused to grant a new trial on her motion.

The errors alleged are:

1. Refusing to dismiss the appellee's answer and cross motion, when the appellant had dismissed her motion.
2. Rescinding the former order giving the custody of the child to the mother.
3. Refusing to grant a new trial.

Under the first assignment of error, it is claimed by counsel for the appellant that the dismissal or withdrawal of the motion made by her had the effect to put the appellee out of court with his motion also.

This litigation took place under the law in force prior to that of March 10th, 1873. The record shows that the appellant filed a petition for a divorce, and that the appellee filed a cross petition. Now, the law is, that had the appellant dismissed her petition, still the appellee would have had the right to proceed on his cross petition. 2 G. & H. 352, sec. 14. Why should not the same rule apply with reference to the motions in this case? We do not regard the motion

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made by the appellant to have the judgment of the court relating to the custody of the child modified as an action. No authority is produced to show that the rule contended for by counsel for the appellant has ever been applied to mere motions. Here the appellant sought to have the judgment modified so as to allow her to have the custody of the child without any restrictions or conditions as to her place of residence. The appellee thereupon moved the court to set aside the order entirely, thus, in effect, leaving him entitled to the custody of the child. The tendency of the legislation of this State has been to allow parties, when brought into court, to assert their rights against their adversary, notwithstanding he may seek to withdraw from the contest. Such is the law as to set-off and counter-claim. 2 G. & H. 217, sec. 365. And such is the law in divorce cases. Acts 1873, Reg. Sess., p. 111, sec. 15. Regarding this proceeding as somewhat analogous to the original application for a divorce and to settle the question as to the custody of children, we hold that the court committed no error in refusing to dismiss the appellee's motion.

The appellant urges, under the remaining assignments of errors, that the evidence did not warrant the court in revoking the former order, and thus, in effect, giving the father the custody of the child. Counsel urge the superior fitness of the mother in view of the fact that the child is a female. The record shows that the child is a male. He was about five years of age when the divorce suit was commenced, and when the order was set aside he was about seven years old. Probably the fact that the mother had disregarded the order of the court had something to do with the change made. The mother alleges that the father of the child has no home of his own, but makes his home with the grandfather of the child. It is probably a fair set-off to this, that, as the evidence shows, the mother has no home of her own. These are always embarrassing questions, unless there is a clear preference between the parents on account of the superior fitness of one of them.

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In this case we see no sufficient reason why we should disturb the action of the court below.

The judgment is affirmed, with costs.

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**JUROR.**—*Challenge.*—*Opinion Formed and Expressed.*—It is not a good cause for the challenging of a juror, that he testifies that he has formed and expressed an opinion upon the merits of the cause and the rights of the parties, as the result of a conversation with one of the parties or from rumor, but that the opinion formed will readily yield to the evidence presented on the trial, and that he can hear the evidence and decide the case as impartially as though he had not formed and expressed an opinion.

**EVIDENCE.**—*Privileged Communication.* — *Attorney.* — *Husband and Wife.*—On the trial of an action brought by a married woman to recover possession of her separate real estate from her vendee, a witness may not, over her objection, detail a conversation had with her by him as the attorney of her husband in relation to the sale of certain personal property purchased with money derived from the sale of such real estate. In such case the attorney will be regarded as the attorney of both the husband and wife.

**SAME.**—*Judgment Procured by Fraud.*—Where a court may ascertain by inspection of its own records that a judgment, the record of which is offered in evidence, valid on its face, was procured by fraud, it is error to admit such evidence over objection.

**MARRIED WOMAN.** — *Infancy and Coverture.* — *Contract.* — *Disaffirmance.*—A deed of conveyance of the separate real estate of a married woman, or of an infant married woman, executed by her alone, is void; if her husband join therein, the disability of her coverture is wholly removed, and, if she be an infant, that of her infancy renders the joint conveyance not void, but voidable, and vests the title to the land in the grantee, subject to the female grantor's right of disaffirmance upon her arrival at the age of twenty-one years, and until divested by some act done by her to disaffirm the contract; which, though she remain a *feme covert*, must be done by her within a reasonable time after her arrival at age, although she is not required to bring her action to recover possession during the continuance of her coverture.

**SAME.**—*Act of Disaffirmance.*—A written notice given by such *feme covert* after her arrival at age, that she disaffirms such executed contract, is a sufficient act of disaffirmance.

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**SAME.**—*Reasonable Time.*—Such an act of disaffirmance done within three years and a half after the female grantor's arrival at age was held to have been done within a reasonable time.

**SAME.**—*Evidence.*—*Ratification.*—On the trial of an action brought by a married woman to recover possession of her separate real estate, conveyed by her and her husband to the defendant, on the ground that when the conveyance was made she was an infant and a *feme covert*, and that she had given to the defendant written notice of her disaffirmance of the conveyance within three years and a half after her arrival at age, acts and declarations of the plaintiff done and made after her arrival at age and before her disaffirmance of the contract, tending to prove a ratification of her conveyance to the defendant, were admissible in evidence.

**SAME.**—*Estoppel.*—In such case, the fact that when the female grantor became of age the defendant was indebted to the husband of the female grantor upon notes given for the purchase-money of said real estate, in a large sum, which was afterwards paid by the defendant, would not estop her from subsequently disaffirming the contract, unless she knew that such purchase-money was unpaid and the defendant was ignorant of the fact that the plaintiff was an infant when she executed the conveyance.

**NEW TRIAL.**—*As of Right.*—*Practice.*—When a motion for a new trial for cause, in an action for the recovery of the possession of real estate, is overruled, and an order is thereupon entered that the party who made such motion shall have a new trial as of right upon payment of costs within one year, such order is nugatory, the maker of such motion not being precluded by the overruling thereof from taking a new trial as of right, as provided by section 601 of the code.

From the Ohio Circuit Court.

*H. A. Downey, S. R. Downey and D. T. Downey*, for appellant.

*W. S. Holman*, for appellees.

**BUSKIRK, C. J.**—By this action the appellant sought to recover the possession of certain described real estate, upon the ground that when she and her husband conveyed the same to appellee Stewart, she was an infant, under the age of twenty-one years, and a *feme covert*. Ricketts, the other appellee, was the tenant of Stewart, and need not be further mentioned.

Issue, trial by jury, verdict for appellees, motion for new trial overruled, and judgment on verdict.

The action of the court in overruling the motion for a new

trial is assigned for error, and presents all the questions arising in the record.

The first, second and third reasons assigned for a new trial were, that the court erroneously overruled appellant's challenge to Levi Scroggin, William Gerrard and Ezra Hastings, called as jurors.

One of the three persons called as jurors (Hastings) testified that he "had asked said Stewart if he had such a case in court, and Stewart said he had, but did not talk much about it, but he (Hastings) had formed and expressed an opinion concerning the merits of the case; that he believed the opinion formed by him would readily yield to the evidence presented upon the trial, and that he could hear the evidence and decide the case as impartially as though he had not previously formed or expressed an opinion upon the case."

Each of the other two jurors testified "that he had heard the case talked about by various persons; that, upon what he had heard, he had formed and expressed an opinion upon the merits of the case and the rights of the parties; that he believed his opinion was of such a character that it would readily yield to the testimony that might be offered in the case."

The appellant challenged each of the above named jurors for cause, but the court overruled the objection, and held each of such jurors to be competent.

One of the jurors had formed and expressed an opinion, as the result of a conversation with Stewart, the appellee, and the other two jurors had formed and expressed opinions from rumor; but they all stated that the opinion formed would readily yield to the evidence presented upon the trial, and that they could hear the evidence and decide the case as impartially as though they had not formed and expressed opinions.

The question presented for our decision is, whether such persons were competent jurors. A question of such frequency and importance in practice ought to have been definitely settled, and should not, at this late day, be regarded as

an open and debatable question, and yet learned counsel earnestly rely upon adjudged cases in this court as sustaining diametrically opposite views. This renders it necessary that we should review the previous decisions of this court, with the view of arriving at some fixed and definite rule upon the subject.

The first case which we have met with in this court, involving the question under examination, is that of *McGregg v. The State*, 4 Blackf. 101. There the juror testified that he had formed and expressed an opinion as to the defendant's guilt from report; but that he had heard no witness, as he knew of, speak of the transaction; that he lived eighteen miles from the neighborhood of the defendant, and he had never been in the defendant's neighborhood since the transaction complained of.

The court, after reviewing some English and American cases and quoting the statute in reference to the challenge of jurors in criminal cases, proceed to say:

"We consider that, under this statute, when the juror answers that he has formed or expressed an opinion of the defendant's guilt, there are other inquiries to be made before the juror can be set aside. The nature and cause of the opinion must be inquired into. If it appear from the answers of the juror, or from any other testimony, that he has formed or expressed an opinion of the defendant's guilt out of ill-will to the prisoner, or that he has such a fixed opinion of the defendant's guilt as will probably prevent him from giving an impartial verdict, the challenge ought to be sustained. But if the opinion be merely of that light and transient character, so commonly formed when we hear any reports of the commission of an offence, such an opinion merely as would probably be changed by the relation of the next person met with, it is not a sufficient cause of challenge.

"In the case under consideration, the juror's opinion was occasioned merely by reports. There was no proof that the opinion proceeded from ill-will to the defendant, or that it was so firmly settled as to justify a belief that the juror

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would not do the defendant justice. The challenge, therefore, could not be sustained."

In *Maize v. Sewell*, 4 Blackf. 447, which was a civil action, the defendant objected to a juror upon the ground that he had formed and expressed an opinion in the cause, and asked the leave of the court to ask such juror under oath whether he had formed and expressed an opinion; but the court overruled the motion, and would not permit the question to be asked, and retained the juror on the jury. The court said it was not competent at common law to ask a juror in a criminal case whether he had formed and expressed an opinion, as, in such case, a person was guilty of a misbehavior and a thing dishonorable, to form and express an opinion; but that it was made competent by statute to ask such questions in both civil and criminal causes. The court said:

"We regard the law as being now well settled, that it is a good cause of challenge to a juror that he had expressed an opinion on the merits of the cause he is called upon to try." The case of *McGregg v. The State*, *supra*, was referred to.

In *Van Vacter v. McKillip*, 7 Blackf. 578, the juror answered, "that he did not know but that he had formed an opinion in the case from rumor," but "that he thought his opinion would readily yield to the evidence, if it should differ from the rumor he had heard." The court referred to *McGregg v. The State*, *supra*, and said:

"We adhere to the decision there made, that an opinion, founded merely on report, where there is no proof of ill-will to either of the parties; or where the opinion is not so firmly settled as to justify a belief that the juror would not do justice in the case; it is not sufficient to disqualify him from serving."

*Goodwin v. Blachley*, 4 Ind. 438, was a civil action. One of the jurors, being sworn and examined touching his competency, said he had heard a statement of the facts from a part of the witnesses, "but that his opinion would readily yield to the evidence, and he believed he could hear and determine the case as impartially as if he had never formed

any opinion on the subject; that if the evidence should turn out as he had heard it, he thought his opinion would be the same as formerly; but that he would determine the case from the evidence here, and not from what he had previously heard." Upon this profession of impartiality, the objection to his competency was overruled. This court said:

"The purity and proximate correctness of judicial proceedings depend chiefly on the impartiality, or, as the books term it, the indifference, of those whose duty it is to find the facts. These once settled, there is seldom any doubt about the law. When the jury system is eulogized, it means, of course, a jury composed of men of fair, unprejudiced minds. It goes on the presumption that passion, ill-will, preconceived opinions, and everything unfavorable to a candid exercise of the judgment, is to be excluded from the jury box. Impartiality can hardly be expected from the clearest intellect, if embarrassed in its action by an opinion both formed and expressed.

"Some authorities say the test is, whether the opinion be fixed or trivial. But human ingenuity cannot devise means to measure the degree of tenacity in each case. Nor is the manner of forming the opinion, whether hasty or deliberate, by any means a sure test. The safe rule—that which will more certainly secure an impartial trial—is to regard those jurors only as competent who are altogether indifferent. From such a rule, in most of the counties containing from one to two thousand qualified jurors, with the supplemental aid of change of venue, etc., no practical inconvenience can ordinarily result. And if there should, the pure and impartial administration of justice is the great end to be attained, at whatever cost or inconvenience.

"In the case at bar, the juror had both formed and expressed an opinion on the merits of the cause, and that, too, on information derived from the witnesses. Few minds could act under such impressions with entire fairness. However honest, the juror carried with him into the box a subtle and active element, not legitimately derived from

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the evidence. That the juror did not, after all, distrust himself, was the most cogent reason why the parties litigant should distrust him. Had he qualified his declared intention of being impartial with any doubt of his ability to be so, his intelligent candor might well have commended him to both parties as a safe juror; though it might not have restored his competency, if the objection was urged."

In *Morgan v. Stevenson*, 6 Ind. 169, the juror answered that he had not formed or expressed an opinion in the case, nor had he formed or expressed any opinion as to which of the parties should succeed; that his mind was free to decide the case according to evidence, though he had formed an opinion as to some matters in controversy. The court say:

"If a person called as a juror has formed an opinion on the merits of the cause, such as would not readily yield to the testimony offered, he would be incompetent. His opinion must, however, be fixed and settled; for if merely light and transient, such as would leave the mind open to a fair construction of the testimony, it would constitute no sufficient objection to the juror. 1 Burr's Trial, 416." The court, after reviewing the cases hereinbefore cited from 4 and 7 Blackf. and 4 Ind., say:

"In these cases, it will be seen that the reason which led to the pre-opinion of the juror is distinctly stated. But in the present case, the person called simply states that 'he had formed an opinion as to some of the matters in controversy,' but 'that his mind was still free to decide according to the evidence.'

"The latter statement, it is true, would have no weight, if it appeared that his opinion was the result of ill-will to one of the parties, or grounded upon a knowledge of the facts of the case. But here the proposed juror, in effect, explicitly declares that he stands indifferent. And it seems to us, that in the absence of all evidence leading to the belief that the opinion so formed would not have readily yielded to the testimony to be given on the trial, we must believe what he has said on the subject. Unless this be done, the propriety

of examining a juror at all on his *voire dire* is not obvious."

In *Rice v. The State*, 7 Ind. 332, the court say:

"The jurors objected to by the prisoner and declared competent by the court, stated, upon examination, that they had heard considerable talk about the case, and had read the newspaper accounts of it; that they were rather inclined to think, if what they had read was correct, the defendant was guilty; that they had never talked with any of the witnesses, had never formed or expressed an opinion, had no ill-will against the defendant, and could give him a fair trial according to the law and the evidence.

"We have no doubt of the competency of these jurors. *Morgan v. Stevenson*, 6 Ind. 169.

"In this country, where education and reading are so general, the facilities of intercourse so great, and the diffusion of information by the press is so speedy and universal, it would be almost impossible to procure a jury, composed of men of common intelligence—of sufficient, indeed, to render them competent—who had no knowledge of important events occurring in the State. Again, belief is not an act of volition. The mind yields of necessity to evidence. No compulsion of authority, or force of will, could make a man believe white was black. Either, or prejudice, might induce him to say he believed this or that, but the expression would be a falsehood, if it differed from the involuntary conclusion of his mind upon the evidence. Galileo, on the 20th of June, 1633, solemnly admitted upon his knees before the inquisition, assembled in the convent of Minerva at Rome, that the doctrine of the earth's motion was false, and even yet, while rising, whispered to a friend, 'It moves for all that.' The mind, therefore, of an honest, unprejudiced juror will necessarily be forced to its conclusion by the evidence adduced upon the trial of the cause in which he sits.

"Again, a juror cannot convict, in all cases, upon mere belief. It must be a belief, founded upon legal evidence, of guilt according to the rules of law. It is probable a juror not unfrequently retires from the box after agreeing to a

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verdict of acquittal, for want of legal proof of guilt, believing, at the same time, morally, that the defendant was guilty. What is wanted, therefore, to constitute a reasonably unexceptionable juror is capacity, honesty, independence, and freedom from prejudice and opinion founded upon the particular evidence to be given in the cause. It does not appear that the jurors objected to in this case did not possess these requisites. Entire freedom from all knowledge of the case would not be undesirable, if it could be attained in connection with the requisite capacity. But that, in this country, would generally be impossible.

“Here the jurors had not talked with the witnesses, and, hence, had no opportunity to form opinions on the testimony to be produced on the trial. See *Goodwin v. Blachley*, 4 Ind. 438.”

In *Bradford v. The State*, 15 Ind. 347, it was said:

“It is argued that, under our statute, a juror who has formed or expressed an opinion as to the guilt or innocence of a person charged with a crime, is incompetent to sit as a trier; totally and absolutely so. And it is earnestly urged that the statute is, in that respect, different from others anterior thereto, and that it precludes the court from the exercise of any discretion in accepting or rejecting a juror, who states that he has formed or expressed an opinion; and that it matters not as to the source from which the information upon which the opinion was so formed was derived.”

The court, after quoting section 84 of the criminal code, say:

“In our opinion the proper construction to be placed upon this statute is, that, in ordinary cases, the parties must avail themselves of the right to examine and challenge jurors, either peremptorily or for cause; if for cause, the court, after hearing the examination, etc., exercises a sound, legal discretion in determining as to the competency of the juror. One of the disabilities of a person called is the formation or expression of an opinion, etc. It is so declared by the statute. The legal doctrine thus embodied in the statute

had always been acted upon in practice in this State. To determine whether the sound, legal discretion vested in the judge has been abused or properly exercised, we must, in each instance, examine the question whether the opinion of the person offered had been formed upon such information, or information derived from such a source, as would probably make such an impression as might influence him, after hearing the facts detailed on the trial. In determining this question, the court below, and this court, should be governed by the legal rules applicable in such case, and which have obtained in reference to like cases, before the enactment of the statute.

“An opinion based upon mere rumor, not from a knowledge of the facts, from hearing evidence, or from conversing with witnesses, unless firmly fixed, has been repeatedly held to be no cause for a peremptory challenge, before the passage of this statute.”

In *Fahnestock v. The State*, 23 Ind. 231, this court, ELLIOTT, J., speaking for the court, said:

“The object of both the constitution and the statute is evidently to secure to the accused a fair and impartial trial, by unprejudiced jurors. The mind should be free from any previously formed positive conclusions, as to the guilt or innocence of the accused, or the material facts involved in the case; it should be in a condition to receive, judge of, and apply the evidence to the alleged facts, with the same freedom of will that would be presumed to exist if the juror had for the first time heard of the case in the jury box. If from previously formed opinion, it would require either more or less evidence to satisfy the mind of the existence or non-existence of the material facts involved, then the juror is not impartial, and is therefore incompetent. The commission of a crime of the character of the one charged in this case, naturally produces more or less excitement in the vicinity of its enactment, and with the various means of speedy communication existing almost everywhere in this country, intelligence of the act is very soon generally disseminated

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throughout the immediate community, and it would in many cases be impossible to find a jury, composed of men of ordinary intelligence, who had never heard of the case before being called into the jury box. It is often impossible to avoid the formation of an opinion of some kind from mere hearsay or rumors. Such opinions, however, where the facts are only judged of by mere rumor, or the relation of persons not claiming to have any personal knowledge of them, would make but a slight impression on a mind of ordinary intelligence, and could scarcely form an impediment to a fair and proper conclusion from the legal evidence given on the trial."

In *Burk v. The State*, 27 Ind. 430, it was held that a juror was not incompetent who, when interrogated as to his competency, answered that he had formed an opinion as to the guilt of the defendant, if what he had heard was true.

In *Morgan v. The State*, 31 Ind. 193, on the examination of persons called as jurors to try an indictment for murder, as to their competency, certain ones of the panel answered, that they had formed opinions as to the guilt or innocence of the defendant, from rumor and newspaper statements on that subject. Upon further examination, each of said persons answered, that it would require neither more nor less evidence to satisfy him of the existence or non-existence of the material facts involved in the case by reason of his so already formed opinion; and it was held that such persons were competent jurors; and the ruling in *Fahnestock v. The State*, *supra*, was expressly adhered to.

In *Clem v. The State*, 33 Ind. 418, the rulings in *Fahnestock v. The State*, *supra*, and *Morgan v. The State*, *supra*, were adhered to, and the court added:

"It may be regarded as settled, that the opinion which, under our statute, renders a juror incompetent is not that vague and unsatisfactory impression which the mind receives at second hand, and which vanishes in the presence of authentic testimony, and upon which no man of common sense would take responsible action."

In *Cluck v. The State*, 40 Ind. 263, the facts in reference to the competency of the juror were very similar to those in *Morgan v. The State*, *supra*, and the ruling was the same.

In our opinion, the rule laid down in *Fahnestock v. The State*, *supra*, is more accurate, comprehensive and practical than that stated in any of the preceding cases, and should be regarded as the settled rule in this State.

We think it plainly appears from the foregoing authorities, that the jurors in question were competent, and that the court committed no error in overruling the objections urged to them.

The fourth reason assigned for a new trial is, that the court erred in overruling the objection urged to the competency of Rodman L. Davis as a witness in this cause.

The appellant sought to recover the land in controversy, upon the ground that when she and her husband sold and conveyed the same to the appellee she was an infant married woman. The appellee, among other defences, relied upon a ratification of her contract after her arrival at age, and, as tending to prove such ratification, Mr. Davis was introduced to prove certain acts, and to detail a conversation had with her in reference to the sale of the furniture of a hotel to Mr. Grant. The appellant objected to the competency of Mr. Davis, upon the ground that when such acts were performed and conversation had, he was the attorney of Mr. Scranton, and that his information was derived from Mrs. Scranton solely in consequence of the confidential relation which he sustained to Mr. Scranton and wife. The objection was overruled, and an exception taken. Mr. Davis testified that he was acting as the attorney of Mr. Scranton; that Grant and Scranton asked him to draw up an agreement and mortgage, which he did; that they were at the hotel, and, at the request of Grant and Scranton, he went into another room to see Mrs. Scranton about certain articles of furniture, which Grant claimed went with the other furniture, and which Scranton denied, upon the ground that such articles belonged solely to Mrs. Scranton; that he informed Mrs. Scranton that

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the trade was about to fall through in consequence of such differences, and inquired of her what she said, to which she answered, for Mr. Scranton to do as he liked or thought best, and she would consent to whatever he did in the premises. Davis also testified that he was one of the attorneys for defendant Stewart in the case then on trial. Upon cross-examination, he stated that he had, at such time, a claim against Scranton for fees as an attorney, amounting to one hundred and twenty-five dollars; that Grant paid him two hundred dollars, being a part of the purchase-money for the hotel furniture, a part of which he paid to Scranton, but that he could not tell how much he retained, or how much he paid over. He further testified: "I talked the matter over with Mr. Scranton before he saw Mr. Grant, and he took advice from me about the trade. I advised them, I suppose, as a financier."

We think it very plainly appears that Mr. Davis was acting as the attorney of Mr. Scranton at the time he had the conversation with Mrs. Scranton, and that she conversed with him in that capacity, and whatever information he derived from her was obtained by reason of the confidential relations which he sustained to Mr. Scranton. The question which we are required to decide is, whether it was competent for Mr. Davis to detail as a witness, in an action brought by Mrs. Scranton in reference to her separate real estate, a conversation which he had with her as the attorney of her husband in relation to personal property which had been purchased with money derived from the sale of her separate real estate, to recover which the present action was brought.

We are of opinion that Mr. Davis should be regarded as the attorney of both Mr. and Mrs. Scranton, and that the communication made by Mrs. Scranton was privileged. Taylor, in his very accurate and valuable work on evidence, in vol. 1, p. 826, says:

"So, if a wife were induced by her husband to deal with her separate interest under the advice of her husband's attor-

ney, such attorney would be regarded by the client as acting for both husband and wife; and consequently, in the event of any dispute arising between the married couple, each party would be entitled to call for the production, and to have full inspection, of all documents that might have come into the possession of the attorney in the course of the transaction."

The same doctrine is laid down in *Warde v. Warde*, 3 Macn. & G. 365, which overruled the decision of Lord Cranworth in the same case, reported in 1 Sim. N. S. 18. The Lord Chancellor says:

"This case may be important in its consequences to married women, who when living with their husbands upon terms of affection and confidence are most likely to act upon the representations and advice of their husband's solicitors in dealing with their property and legal rights, and must often be precluded from resorting to other advice, without a breach of domestic harmony and peace; and whenever the husband and wife have distinct interests, and the wife is induced in dealing with those interests to act under the advice of an attorney employed and paid by the husband, I should feel bound to hold that the attorney must be deemed to act as the attorney of both husband and wife, and that each of them would have the right to call for the production and have full inspection of all documents that should come into the possession of the attorney during such employment, relating to the transactions and to the advice given the wife."

We are of opinion that the court erred in admitting the testimony of Mr. Davis, as he is to be regarded as the attorney of both Mr. and Mrs. Scranton.

The fifth reason for a new trial was in these words:

"That the court erred in permitting the defendant upon the trial of said cause to introduce as evidence against the plaintiff the record of the deed from Richard Martin and

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wife to Levi W. Scranton, and the deed of William Schoopshire and wife and Mahala Scott to Levi W. Scranton.

The seventh and ninth reasons for a new trial call in question the action of the court below in permitting the defendant to prove the acts and declarations of the plaintiff, as tending to prove a ratification of her conveyance to the defendant; and as the same objection is urged to the admission of such evidence as is urged to the admission of the deeds mentioned in the fifth cause for a new trial, we will consider such reasons together.

As a statement of the facts of the case is essential to a proper understanding of the questions relating to the admission of the above evidence and to several other questions which arise in the record, we will, at this time, make a brief summary of the material facts as they appear in the record.

The record in this case presents the following facts:

The appellant, a daughter of Joseph P. Richardson, late of Ohio county, Indiana, was born on the 12th day of January, 1846, and was married to Levi W. Scranton on the 16th day of October, 1862. At the time of her marriage, she was seized in fee simple of a tract of land situate in Ohio county, Indiana, containing about forty-five acres, and a small undivided interest in another tract, subject to the dower estate of her mother. On the 2d day of March, 1864, when she was in the nineteenth year of her age, she and her husband conveyed the land so inherited from her father to the appellee George W. Stewart, for the consideration of two thousand five hundred dollars; two hundred and fifty dollars of which was paid at the time, and promissory notes were at the time given by Stewart to Levi W. Scranton for the balance of the purchase-money, payable as follows:

Five hundred dollars on the 1st day of March, 1865; five hundred dollars on the 1st day of March, 1866; five hundred dollars on the 1st day of March, 1867; five hundred dollars on the 1st day of March, 1868; and two hundred and fifty dollars on the 1st day of March, 1869; all of the notes drawing interest from the 26th day of November,

1863; and there was also a mortgage on the real estate conveyed to secure their payment.

The deed, notes and mortgages were all executed at the same time, in the presence of Mrs. Polly Richardson, the appellant's mother, and other members of her family, and the mother signed the deed, and the justice who took the acknowledgment certified that "the said Polly Richardson declares before me that she is the mother of the said Arabella Scranton, and that she believes the above conveyance is for the benefit of said Arabella Scranton, and that it would be prejudicial to her, said Arabella, and her husband, Levi W. Scranton, to be prevented from disposing of the land above conveyed." This feature, while it manifestly resulted from a mutual misapprehension of the law, is still evidence of the good faith and fairness of the transaction.

After the sale of the land, the appellant and her husband continued to reside in the county of Ohio, and within six miles of the land, up to the time of the trial of this cause in the Ohio Circuit Court, and a great portion of the time were carrying on a hotel in Rising Sun, the county seat of that county.

At the time of the conveyance of the land to Stewart, it was wholly unimproved. He took possession of the land, cleared off portions of it from time to time, in all from ten to twelve acres, paid the taxes, and as the notes given for the purchase-money became respectively due, paid them off, Levi W. Scranton having assigned the notes, or a part of them, to different persons, to whom the payments were made.

Mrs. Scranton became twenty-one years of age on the 12th day of January, 1867. At that time three of the notes, amounting in the aggregate to one thousand two hundred and fifty dollars, one-half of the purchase-money, were still unpaid. The last payment was made about the 1st day of March, 1869.

On the 16th day of February, 1870, Mrs. Scranton, through I. G. Foster, Esq., then an attorney at law of the Ohio Circuit Court, brought her action in that court against

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her husband, and alleged in her complaint that after her marriage she sold out her interest in her father's estate and placed the money in the hands of her husband, to purchase a farm; that her husband purchased the farm as directed, but, without her knowledge or consent, he took the title in his own name; that he afterwards sold the farm and appropriated a part of the proceeds to the purchase of certain personal property, setting it forth, to be used in a hotel in Rising Sun; "and the plaintiff avers that she is a married woman over the age of twenty-one years, and the wife of defendant; that said property above described was purchased with money arising from her sole and separate property, which came to her from the estate of her father, and that the same of right belongs to her as a part of her said separate property; that the said defendant was an agent merely in the management of her separate property; and that she has never in anywise surrendered her right to said property and her interest therein."

And she prays judgment that she be invested with the title to the personal property set forth, "as her absolute property in law and equity," and she demands judgment also for one thousand eight hundred and forty-five dollars and forty-eight cents, the residue of her said separate property.

Levi W. Scranton entered his appearance to this action through R. L. Davis, Esq., an attorney of that court, and confessed the facts set forth, and, on the 24th day of February, 1870, the cause came on for hearing. "And the court, being sufficiently advised in the premises, do find that the matters and things set forth and alleged in the complaint are true. It is therefore adjudged," etc., "that the personal property set forth" (describing it) "vest in the plaintiff, Arabella Scranton, as her absolute property both in law and equity, and that she take and hold the same as her sole and separate property, and that the same be subject to her control. It is further considered by the court that the plaintiff recover of the defendant the sum of eighteen hundred

and fifty-five dollars and forty-eight cents, so found to be due her by said complaint, and also her costs and charges in this behalf laid out and expended.”

This judgment was rendered on the 24th day of February, 1870, and on the 28th day of March, 1870, Levi W. Scranton, with the consent of the appellant, sold the hotel property, or rather a part of it, to B. I. Grant, for seven hundred dollars, three hundred dollars of which was paid by Grant to R. L. Davis, Esq., and two notes and a mortgage given by Grant on the property to the appellant for deferred payments of two hundred dollars each; and when Grant paid the notes, Mrs. Scranton satisfied the mortgage.

On the 22d day of July, 1870, the appellant gave Geo. W. Stewart notice of her disaffirmance of the deed, and shortly after brought her action against him and his tenant, Ricketts, to recover the land. On the 17th day of August, 1870, Geo. W. Stewart filed his answer, the second paragraph of which set forth, among other things, in bar of the action and by way of estoppel, the record of the action of the appellant against her husband; and on the next day, the 18th day of August, 1870, Mrs. Scranton instituted an action in the Ohio Circuit Court against her husband, to annul the former judgment, to which her husband appeared and confessed the facts set forth—that the former proceeding was a fraud—and on the same day a judgment annulling the judgment of the 24th of February was entered.

Subsequent to the conveyance of the land in dispute to Stewart, Levi W. Scranton purchased other real estate, and gave in part payment some of the notes which Stewart had executed. Deeds were made to Scranton, and he and his wife executed mortgages to secure the purchase-money, and these were the instruments referred to in the fifth reason for a new trial.

We think the evidence referred to in the fifth, seventh and ninth reasons for a new trial was admissible as tending to establish a ratification of the conveyance of the land by Mr. Scranton.

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The sixth, eleventh and fourteenth reasons for a new trial are abandoned by counsel for appellant, for the reason that no exceptions to the rulings complained of therein appear in the record.

The tenth is, that the court erred in permitting the defendant to read in evidence the transcript of the judgment in the case of the appellant against her husband, Levi W. Scranton. The objection urged to the competency of such evidence was, that such judgment had been, prior to the time it was offered in evidence, annulled and set aside, upon the ground that it had been procured by fraud. It is contended by counsel for appellant, that, as both judgments were in the court where the case in judgment was being tried, it was solely a question of competency to be determined by the court upon an inspection of the record. Counsel for appellee insists that, as the judgment was valid upon its face, although it might be void by reason of fraud in procuring it, it was competent evidence to go to the jury, and that it was a question of fact to be determined by the jury upon all the evidence whether such judgment had been annulled and set aside. The court is of the opinion that it was a question of law, as to the competency of the transcript, to be determined by the court, and that it erred in admitting the same in evidence, as it plainly appears from both records that the first judgment was procured by fraud.

The thirteenth, fourteenth and fifteenth instructions are complained of by counsel for appellant; and they are as follows:

“One of the questions in this case is, whether the plaintiff, Arabella Scranton, after she became twenty-one years of age, by any act, or omitting to do some act required of her by good faith, has affirmed the deed, which it is alleged she and her husband made to George W. Stewart, while she was under twenty-one years of age. And you should, in deciding that question, consider all the testimony which is before you, and if you find from the evidence that at the time the plaintiff reached twenty-one years of age, there was still

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payable of the purchase-money of the land in question, so deeded by the plaintiff and her husband, twelve hundred and fifty dollars, and that from the time she reached twenty-one years of age, and up to the time she brought this suit, she lived within six miles of the land in question, and frequently saw the defendant Stewart, and during all this period Stewart was in possession of the land in question and paying the taxes thereon, and was, during this period, after she reached twenty-one years of age, paying off the said balance of the purchase-money, and that after the said purchase-money was paid, Mrs. Scranton brought her suit in this court against her husband, alleging that he had, as her agent or trustee, received the purchase-money of said real estate, and invested part thereof in purchasing certain personal property, then in the City Hotel, in Rising Sun, Indiana, and demanding judgment for such property, and also a judgment for the balance of the money her husband had so received, and recovered in this court, in that action, judgment for such personal property and money, and that all this occurred with the knowledge of the plaintiff, and during this period the plaintiff gave no notice to the defendant Stewart of her intention to disaffirm said deed, and gave no such notice until more than three years after she reached the age of twenty-one years, you may find that the plaintiff is estopped from disaffirming said deed; and if you so find, you shall find for the defendant; and if you find that after the commencement of this suit, and after the defendant Stewart had filed his answer, Mrs. Scranton, on the next day, filed in this court her complaint to set aside said judgment so recovered against her husband, and at the same time her husband filed his answer, confessing the allegations of her complaint, and by the agreement of Mrs. Scranton and her husband, on the same day, a judgment was entered in this court to set aside said former judgment against her husband, you should consider all such facts, and all other facts which have been proven, in determining whether such last named judgment was obtained and recovered in good faith or not; and

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if you find that such last named judgment was fraudulently obtained, in such case you should consider the said first judgment as in full force.

“14. The deed of an infant is not void, but voidable only; and if the jury find from the evidence in this case that the plaintiff, while she was under the age of twenty-one years, joined with her husband in the execution of a deed conveying the land in controversy to the defendant, and that such conveyance was made for a valuable and adequate consideration paid by the defendant, said defendant would hold said real estate as a *bona fide* purchaser, and said deed would not be void, and the rights of the defendant, under said deed, could only be defeated by a disaffirmance of said deed by the plaintiff after she arrived of age, under circumstances that would not work a fraud upon the defendant.

“15. If the jury find from the evidence that twelve hundred and fifty dollars of the purchase-money of said real estate became due after the plaintiff arrived at the age of twenty-one years, and that such facts were known to the plaintiff before payment of said part of said purchase-money was made by the defendant, and if the jury further find that the plaintiff suffered and permitted the defendant to pay said sum of twelve hundred and fifty dollars, or part and parcel of this purchase-money of said real estate, after the said plaintiff became of age, and that the plaintiff, having the opportunity so to do, failed and neglected to inform defendant of her intention to avoid and disaffirm said deed, such failure of plaintiff to notify defendant of her intention to disaffirm said deed would be a fraud on the defendant and would estop her from afterwards disaffirming said deed, and your verdict should be for the defendant.”

Three questions are presented for our examination and decision by the foregoing instructions:

1. Is the deed of an infant married woman void? or is it voidable merely?

2. Was the appellant required, after she arrived at the age of twenty-one years and while she remained under cov-

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erture, to disaffirm her conveyance to the appellee? and, if she was, did she, within a reasonable time, disaffirm such conveyance?

3. Are the facts recited in the thirteenth or fifteenth instructions sufficient to estop the appellant from disaffirming her said conveyance and recovering back the real estate in controversy?

The court below, in the fourteenth instruction, charged the jury that the conveyance of the appellant was voidable merely. It is broadly admitted by counsel for appellant that it is squarely settled by the case of *Law v. Long*, 41 Ind. 586, that the contract of an infant is voidable merely; but it is contended that, as the appellant, at the time of the conveyance in question, was not only an infant, but a married woman, her said conveyance was absolutely void and passed no title to the appellee, and hence that she was not required to disaffirm her conveyance.

It is provided by section 6 of the act concerning real property and the alienation thereof, 1 G. & H. 258, that "the joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenant therein."

The fifth and sixth sections of the act touching the marriage relation are as follows:

"Sec. 5. No lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried; *Provided*, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join.

"Sec. 6. The separate deed of the husband shall convey no interest in the wife's land." 1 G. & H. 374-5.

It has been repeatedly held by this court, that the capacity of a married woman to convey her real estate is the creature of statute law; and that, to make her deed effectual to convey her lands, the forms and solemnities prescribed by the statute must be pursued. The statute imperatively provides

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that the wife cannot encumber or convey her lands, except by deed, in which her husband shall join. The separate deed of the wife or of the husband is absolutely void, and neither passes the title to, nor creates an equity in favor of, the grantee. It is as firmly settled that the joint deed of husband and wife is valid and passes the title to the lands of the wife, though she is not bound by the covenants contained therein. *Davis v. Bartholomew*, 3 Ind. 485; *Woods v. Polhemus*, 8 Ind. 60; *Reese v. Cochran*, 10 Ind. 195; *Johnson v. Rockwell*, 12 Ind. 76; *Blackleach v. Harvey*, 14 Ind. 564; *Baxter v. Bodkin*, 25 Ind. 172; *Stevens v. Parish*, 29 Ind. 260; *Shumaker v. Johnson*, 35 Ind. 33; *Mattox v. Hightshue*, 39 Ind. 95; *Hasheagen v. Specker*, 36 Ind. 413; *Kinaman v. Pyle*, 44 Ind. 275.

It was held in *Davis v. Bartholomew* and in *Johnson v. Rockwell*, *supra*, that, to render the joint deed of husband and wife valid, it was necessary that it should be acknowledged in the mode prescribed by the statute; but in *Hubble v. Wright*, 23 Ind. 322, it was held that under the statute of 1852, no difference is made in the mode of executing and acknowledging deeds by married women, and by persons not under disability; that a mortgage executed by a married woman jointly with her husband is valid between the parties as to her without being acknowledged; and that the power of a wife to encumber or convey her land is only limited by requiring her husband to join in the deed, etc.

The ruling in the above case, upon the points stated, has been followed in the cases of *Alsop v. Hutchings*, 25 Ind. 347; *Routh v. Spencer*, 38 Ind. 393.

Under the ruling in the last three cases above cited, the joint deed of husband and wife, as between them and the grantee, will be valid, although not acknowledged by the wife.

But it is earnestly contended by counsel for appellant that there is no statute in this State which empowers an infant married woman to convey her real estate. Section 6, *supra*, says the joint deed of husband and wife shall be sufficient

to convey and pass the lands of the wife. In the fifth section the language is, "no lands of any married woman," etc. Nothing is said about infancy in connection with the power to convey. Any married woman may convey her lands, if her husband joins with her. If it be true that the statute does not embrace an infant married woman, then it must result that all conveyances by married women who are also infants are absolutely void, but it has been repeatedly held that the deed of an infant married women, where her husband joins with her, is not void, but is voidable merely.

*Doe, ex dem. Moore, v. Abernathy*, 7 Blackf. 442; *Hartman v. Kendall*, 4 Ind. 403; *Pitcher v. Laycock*, 7 Ind. 398; *Johnson v. Rockwell*, 12 Ind. 76; *Chapman v. Chapman*, 13 Ind. 396; *Miles v. Lingerian*, 24 Ind. 385; *Law v. Long*, 41 Ind. 586.

At the time the deed in question was executed, the appellant was both a *feme covert* and an infant. The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, and neither can derive any additional force from being coupled with the other. Under our statute, a *feme covert* can not convey her lands, unless her husband joins with her in the deed, and unless the deed is executed in the mode prescribed by the statute; and when a deed is thus executed the disability of coverture is removed, and that of infancy alone remains. The deed of a married woman is void, when the statutory requirements are not complied with. The deed of an infant, whether married or unmarried, is not void, but voidable merely.

In addition to the adjudged cases in this court heretofore cited, we cite, as sustaining the above propositions, the following adjudications in other states:

*Bool v. Mix*, 17 Wend. 119; *Webb v. Hall*, 35 Maine, 336; *Phillips v. Green*, 3 A. K. Marshall, 7; *Prewitt v. Graves*, 5 J. J. Marshall, 114; *Milner v. Turner*, 4 T. B. Mon. 240; *Oldham v. Sale*, 1 B. Mon. 76; *McIlvaine v. Kadel*, 3 Robertson, N. Y. 429; *Ball v. Bullard*, 52 Barb.

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141; *Matherson v. Davis*, 2 Coldwell, 443; *Greenwood v. Coleman*, 34 Ala. 150; *Card v. Patterson*, 5 Ohio St. 319; *Youse v. Norcoms*, 12 Mo. 549; *Kilgore v. Jordan*, 17 Texas, 341.

We proceed to the examination of the second proposition stated. There is a well defined distinction between the acts to be done by the infant on arriving at age, where the contract is executory, and where it is executed. When the contract is executory, such as a promise to pay money, the infant must, to render him liable thereon, on arriving at full age, expressly ratify it, and expressly promise to pay it. When the act is executed, as where a deed has been made, the infant must, on arriving at full age, do some act to disaffirm the contract. In other words, where the contract is executory, there must be an affirmance, to render the contract valid; when it is executed, there must be a disaffirmance, to avoid the operation of the deed. *Fetrow v. Wiseman*, 40 Ind. 148; *Law v. Long*, 41 Ind. 586. The deed of the appellant to the appellee, being voidable merely, vested the title to the land in the appellee, subject to the right of disaffirmance on arriving at age, and the title remained vested in the grantee, until divested by some act of the maker of the deed. In *Miles v. Lingerian*, 24 Ind. 385, it was said: "Under our present statute, the wife may bring her action in regard to her own estate as though she were a *feme sole*; still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although, as to her power to disaffirm her contracts made during minority, her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will, of her husband. But the legislature has not required her to exercise that power during coverture."

If the word "power" in the last sentence is limited to the bringing of the action, it correctly states the law; but if it embraces the disaffirmance of the contract, then it is not the law. Upon a careful review of the authorities and upon

full consideration, it was held in *Law v. Long, supra*, that an infant *feme covert* who had made a conveyance of her lands during infancy was required to disaffirm such conveyance within a reasonable time after arriving at full age. The well defined distinction between laying the foundation to bring an action and the actual bringing of the action, as laid down in *Potter v. Smith*, 36 Ind. 231, was reaffirmed. We think the appellant was required to disaffirm her conveyance within a reasonable time after she arrived at age. The appellant, within three years and a half after arriving of age, gave to the appellee written notice that she disaffirmed the contract. This was a proper mode of disaffirming. Entry is not required. The disaffirmance must precede the bringing of the action. *Law v. Long, supra*. Was the notice given in a reasonable time? In *Doe v. Abernathy*, 7 Blackf. 442, it was held that five years was within a reasonable time. In *Hartman v. Kendall*, 4 Ind. 403, it was held that thirteen years was an unreasonable delay. In *Law v. Long, supra*, it was said that the authorities all agree that the contract must be disaffirmed within "a reasonable time" after the infant arrives at age, but there is great diversity of opinion as to what is "reasonable time." An examination of the above authorities will show that the time required ranges from one to twenty years, according to the peculiar circumstances of each case and the views of different judges and writers.

We think the disaffirmance was within a reasonable time.

It remains to inquire whether the appellant was estopped by her acts from disaffirming her contract. Let us inquire what acts are claimed to effect an estoppel. We think we should disregard the judgment rendered in favor of the appellant and against her husband and the subsequent judgment setting the same aside, the transcripts of such judgments having been improperly permitted to go to the jury.

1. That when the appellant reached full age there was due on the notes given her husband for said land the sum of twelve hundred and fifty dollars, and that such sum was

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paid to Mr. Scranton after her arrival at age, and before her disaffirmance of the contract.

2. That she resided within six miles of the land in dispute from the time she arrived at age up to the commencement of the action.

3. That she frequently saw the appellee from the time she arrived of age, and knew that he was paying her husband the balance due on said purchase-money, and failed to inform the appellee of her intention to disaffirm said contract.

4. That the husband of appellant, with the proceeds of such sale, purchased other property and took the title in his name, and that for a balance on such purchases the appellant joined with her husband in mortgaging the property so purchased.

It is settled by the adjudged cases in this court, that a married woman may be estopped by matters *in pais*. *Gatling v. Rodman*, 6 Ind. 289; *Peck v. Hensley*, 21 Ind. 344; *Law v. Long*, 41 Ind. 586.

Are the above recited acts sufficient to work an estoppel? The most material act relied upon is, that when the appellant came of age there was due her husband, upon the notes given for the purchase-money of the land in dispute, the sum of twelve hundred and fifty dollars, and that she remained silent and permitted the appellee to pay such sum.

To constitute an estoppel in the present case, it must appear that the appellant knew that the purchase-money was unpaid, and that the appellee was ignorant of the fact that the appellant was an infant when the deed was made.

The appellant testified that the appellee was her brother-in-law; that for some time previous to making the deed they had been, and at the time of making it were, enemies and did not speak to each other; that she never had any conversation with the appellee about the sale of the land, the contract having been made by her husband; that she did not know whether it had been sold for cash or on credit; and that she had no knowledge that, when she arrived at age, there was any part of the purchase-money remaining unpaid.

There is some conflict in the evidence as to whether the notes and mortgage given by Stewart to Scranton were read over in the presence of the appellant. The appellant testified that she went into the room where the deed was being made, and signed and acknowledged it, and immediately left the room without hearing any other paper read or talked about. Two of the witnesses were of opinion that she was present when the notes and mortgage were read, but they were not positive. However this may be, there is no evidence which shows that the appellant knew that any portion of the purchase-money was unpaid when she arrived of age. Upon this point her testimony stands undisputed. On the other hand, the evidence tends very strongly to prove that the appellee knew, when he took a conveyance from the appellant and her husband, that she was under the age of twenty-one years. He was her brother-in-law. They lived close together. In the acknowledgment of the deed under which the appellee claims title is the following:

“And the said Polly Richardson declares before me, that she is the mother of the said Arabella Scranton, and that she believes the above conveyance is for the benefit of said Arabella Scranton, and that it would be prejudicial to her, the said Arabella, and her husband, Levi W. Scranton, to be prevented from disposing of the land above conveyed and described; and they, and each of them, voluntarily acknowledge the execution of the annexed deed.”

The above was inserted in the belief that the conveyance in question was governed by section 24 of the act concerning conveyances, 1 G. & H. 264. That section provides that a married woman who is over the age of eighteen and under the age of twenty-one years, may, by the consent of her father, or mother, or guardian, convey her interest in her husband's lands. This section has no application where the wife joins with the husband in the conveyance of her own lands. *Law v. Long, supra.*

If the facts stated do not amount to positive knowledge on the part of the appellee, they were amply sufficient to put

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him on inquiry. One who claims under a deed is chargeable with notice of, and is bound by, the recitals thereof. *Brannon v. May*, 42 Ind. 92.

The thirteenth instruction entirely ignores the questions of knowledge on the part of appellant and ignorance of the facts on the part of the appellee.

The fifteenth instruction charges the jury that if appellant knew that a portion of the purchase-money was unpaid, and she permitted the appellee to pay the same, she was estopped from disaffirming her conveyance; but it omits to say what would be the effect, if the appellee knew that the appellant was a minor when the deed was made. The doctrine of estoppel *in pais* rests upon a reasonable and just foundation. For the prevention of fraud, the law will hold a party to be concluded by his own act or admission. Surely this can have no application where everything was equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights spring, or where the party seeking to conclude him was in no degree influenced by the acts or admissions which are set up. *Fletcher v. Holmes*, 25 Ind. 458; *The Greensburgh, etc., Co. v. Sidener*, 40 Ind. 424; *Foster v. Albert*, 42 Ind. 40.

To estop a minor from disaffirming a conveyance, on arriving at full age, some act must have been done, or there must have been some omission, after reaching majority, which would work injury to the person in possession under color of title, rendering the disaffirmance a fraud upon him. *Miles v. Lingerian*, 24 Ind. 385.

The omission of the appellant to give notice of her intention to disaffirm could not amount to a fraud upon appellee, if she did not know of the indebtedness, and if appellee knew of the infancy of appellant, and was not induced to pay such purchase-money by the acts of the appellant.

Counsel for appellant assume another position in reference to an estoppel, which we have not found necessary to consider or decide, and that is, that if the purchase-money had been paid to the appellant, she might have disaffirmed with-

out restoring the money by her received, and hence that she cannot be estopped by permitting the money to be paid to her husband.

Without expressing any opinion as to the proposition of law contended for, we feel impelled to say that there is great hardship and injustice in the statute which permits an infant *feme covert* to convey her lands by joining with her husband, and then allows her to retain the purchase-money, disaffirm the contract, and recover her lands. The legislature should either provide some mode by which an infant *feme covert* can make a valid conveyance of her lands, or compel her to restore the purchase-money as a condition precedent to the right to disaffirm her conveyance. It is our duty to administer the laws as passed by the legislative and approved by the executive department.

In our opinion, the thirteenth and fifteenth instructions do not properly express the law. The fourteenth instruction is correct.

It is also claimed that the court erred in refusing to instruct as requested by the appellant. The great length of this opinion forbids that we should set out such instructions, or enter into a critical analysis thereof; but, as the case goes back for another trial, it is proper that we should briefly state our opinion thereon.

The first and second are covered by the instructions given by the court. The third and fourth should have been given. The fifth, ninth and tenth are too narrow and restricted to properly express the law. The sixth should have been given. The seventh was properly refused, because it entirely omits to make any reference to the acts of appellant tending to show an affirmance of the contract. Under our ruling, the eighth will become unnecessary.

The court overruled the motion for a new trial for the reasons assigned, but entered an order that the appellant should have a new trial as of right on the condition that the costs were paid within one year. The order was nugatory.

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Buskirk's Practice, 262, 263. A new trial may be granted for cause in real actions as in any other actions. A motion for a new trial for cause which is overruled does not preclude the moving party from afterwards taking a new trial under section 601 of the code, in a case coming within the purview thereof.

The judgment is reversed, with costs; and the cause is remanded, for a new trial in accordance with this opinion.

DOWNEY, J., having been engaged as counsel, was absent and took no part in the decision.

PETTIT, J.—I concur in the conclusion of the court in this case, but to that part of the opinion which holds that a notice of disaffirmance was necessary before suit could be brought, I dissent, for two reasons:

1. Because I think that question is not in the case. Notice was given, and the court holds that it was sufficient and given in time. Why, then, hold that notice of disaffirmance was necessary to be given in such a case before suit could be brought?

2. If it ever was the law in this State that notice of disaffirmance in such a case must be given before suit brought, it could only have been on the foundation or reason that the defendant, thus having notice of an intended suit, might quitclaim or release any interest in the property, and thus save himself from costs in the threatened suit. It cannot now be the law, for on the subject of such actions as this our legislature has enacted: "If in such cases the defendant disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the defendant shall recover costs." 2 G. & H. 284, sec. 613. Thus it seems that a defendant notified would be put in a worse condition than one not notified before suit brought. In the former case, he would have to make a release or quitclaim deed to avoid costs, while in the latter case he would only have to stay away from court to avoid costs.

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See the notes to this section. See, also, sec. 396 and notes, 2 G. & H. 225-6.

The reason of the law requiring notice, if it was ever law in such a case, having ceased and failed in this State, the law does no longer exist. This is true of all laws, religious and moral, in their localities, national, international, state, municipal, and of society.

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### ABSHIRE v. THE STATE, EX REL. BICKLE.

**BASTARDY.**—*Finding of Justice of the Peace.*—The affidavit, or complaint, filed before a justice of the peace in a bastardy proceeding, charged that the defendant was the father of a child of which the relatrix had been delivered. The justice found "the said complaint true."

*Held*, that this was, in effect, a finding that the defendant was the father of the child.

**SAME.**—*Open and Close.*—It was not error to award to the State the close of the argument on the trial of a bastardy proceeding, when the law allowing the defendant in a criminal action the close of the argument was in force.

**MOTION FOR NEW TRIAL.**—The refusal to award to a party the close of the argument upon the trial of an action, if error, should be assigned as a cause in a motion for a new trial, and cannot constitute an assignment of error on appeal to the Supreme Court.

**BASTARDY.**—*Attorney's Fees.*—*Evidence.*—The fees of attorneys employed by the relatrix in a bastardy proceeding cannot be recovered by her in such proceeding, and it is error to allow her on the trial thereof, over the defendant's objection, to introduce evidence to prove the amount of such fees.

From the Wabash Circuit Court.

A. Taylor and F. M. Morgan, for appellant.

DOWNEY, J.—This was a prosecution for bastardy by the appellee against the appellant. The prosecution was commenced before one J. G. McGuire, a justice of the peace. At the instance of the defendant, there was a change of

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venue, and the cause was sent to one William L. Russell, another justice of the peace. Here there was an examination of the relatrix, and the justice of the peace found "the said complaint true." The defendant was recognized to the common pleas.

Omitting the mention of some motions hereafter noticed, the defendant filed a general denial of the complaint; there was a trial by a jury, a verdict against the defendant, a motion for a new trial overruled, and judgment for the State.

There are six errors assigned.

1. It is claimed that the court improperly overruled the motion of the defendant to dismiss the cause, for the reason that there was no finding against the defendant by the justice hearing the charge. The affidavit or complaint charged that the defendant was the father of the child of which the relatrix had been delivered. The justice found that the complaint was true. This was, in effect, finding that the defendant was the father of the child.

2. The court awarded to the State the close of the argument. It is claimed that, as the law allowing a defendant in a criminal action the close of the argument was in force when this cause was tried, this ruling was erroneous. We think not. This is a civil, and not a criminal action. But if this was not so, the objection to the proceeding should have been urged as a reason for a new trial, and not as an independent assignment of errors.

3. It is next urged that the court erred in overruling the defendant's motion for a new trial. The only reason alleged for a new trial in the written motion is, that the evidence was not sufficient to justify the verdict of the jury. The evidence is not in the record, and, therefore, the question is not before us.

4. The next alleged error is the ruling of the court in admitting the testimony of one Williams to enable the court to fix the amount, in part, which should be allowed against the defendant. The child lived less than two months. The court allowed for the nursing, clothing, medical attention,

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and funeral expenses of the child, sixty-one dollars. Evidence was offered of the amount of the fees of three attorneys employed by the relatrix, to which the defendant objected. The court overruled the objection, heard the evidence, and allowed the sum of sixty dollars for such fees, making a total of one hundred and twenty-one dollars. A new trial of this matter was asked in a separate motion and refused, and this refusal is assigned as an error.

We are of the opinion that the ruling cannot be sustained. The court is authorized to allow for the "maintenance and education" of the child. 2 G. & H. 628, sec. 15. There is no law, of which we have any knowledge, that authorizes the court to allow against the defendant the fees of attorneys employed by the relatrix. It is not necessary that she should incur the expense of the employment of counsel; for the statute makes it the duty of the prosecuting attorney to prosecute all such cases without expense to her. 2 G. & H. 629, sec. 21.

5 and 6. These assignments do not present any question not already disposed of.

Counsel argue a question with reference to witness fees taxed in favor of the relatrix, but there is no assignment of error raising that question.

The judgment is reversed, as to sixty dollars of the same, being for the attorneys' fees allowed, and as to the residue, being sixty-one dollars, it is affirmed.

BOARDMAN ET AL. v. GRIFFIN.

**VARIANCE.—Material Variance.**—Parties to an action must recover, if at all, upon the allegations of the pleadings therein; and when the trial is by the court, it cannot, any more than a jury, go outside of the case made by the pleadings and find for a party upon facts different in their general scope and meaning from the facts pleaded.

From the Marion Circuit Court.

52	101
126	367
52	101
131	299
52	101
136	606
52	101
138	131
139	414
139	468
52	101
143	485
52	101
155	40

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Boardman *et al.* v. Griffin.

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*D. V. Burns*, for appellants.

*H. W. Harrington* and *H. Francisco*, for appellee.

DOWNEY, J.—The appellee as assignee of George Borsdorfer, an insolvent debtor, sued Omer B. Boardman, a constable, and Andrew Wallace, the execution plaintiff, to enjoin the collection of an execution in the hands of the constable, on a judgment in favor of Wallace against Borsdorfer before a justice of the peace. It is alleged, in substance, in the complaint, that the assignment to the appellee was made by the insolvent, and took effect by being recorded on the 15th day of October, 1874, and that the execution bore date on the 14th day of the same month. It is charged that, in fact, the execution issued on the 15th day of the month, and after the assignment was perfected; that Wallace's judgment was for about twenty dollars more than was legally due; that there was in the judgment twenty-five dollars for interest on an account and an addition of eight dollars in excess of said interest on said account. It is alleged that Borsdorfer was not a resident of the township in which Wallace sued him, and was about to plead that fact, and that Wallace agreed that if he would not, but would let judgment be rendered against him, no execution should issue thereon for six months, and that said Borsdorfer did allow judgment to be rendered against him accordingly, on the 24th day of September, 1874. A temporary restraining order was granted.

Wallace answered that on the 14th day of October, 1874, he caused the execution to issue on his judgment, denied that he made the agreement to abstain from issuing execution on the judgment for six months, or for any other time, but did agree, after the rendition of the judgment, that in case he was satisfied that no such disposition of Borsdorfer's property would be made as would endanger the collection of his judgment, he would not cause a levy of his execution to be made for six months; but he alleges that this agreement was wholly voluntary and without consideration. He also denies all the allegations of the complaint not expressly

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Boardman *et al.* v. Griffin.

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admitted, and specially denies that he ever made any agreement not to have an execution issued on his judgment. He alleges that by the wrongful issuing of the restraining order herein he has suffered great loss and has been compelled to employ counsel at an expense of fifty dollars, which he prays may be allowed him as damages, etc.

There was a trial by the court, and, by request, a special finding of facts and conclusions of law, as follows:

“The court, upon request of the parties, plaintiff and defendant, finds specially upon the facts as follows: That on the 24th day of September, 1874, defendant Andrew Wallace recovered a judgment against George Borsdorfer before Esquire William H. Schmidts, a justice of the peace of Center township, Marion county, Indiana, for one hundred and ten dollars; that at the time of the rendition of said judgment Borsdorfer was not a resident of said township, but was a resident of another township of said county; that he, however, appeared before said justice at the time the judgment was rendered, and consented to judgment being entered against him for the amount for which it was entered; also, that he had appeared before said justice at previous sittings of the case, without raising the question of jurisdiction; that at the time said parties met at said justice’s office, on the day judgment was rendered, and after the defendant, Borsdorfer, had agreed to let judgment go, he asked plaintiff, Wallace, if he would require him to stay execution on the judgment, and stated that he expected to continue business as he had heretofore been conducting it; that Wallace thereupon replied that judgment might stand six months without bail, if everything went on as before with Borsdorfer, and so informed the justice, who entered in pencil on the entry of the judgment on his docket that no execution was to issue for six months; that there was no agreement between Wallace and Borsdorfer that in consideration of Borsdorfer waiving the question of jurisdiction and consenting that judgment should go, Wallace would not cause execution to issue on the judgment for six months; nor was

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*Boardman et al. v. Griffin.*

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the judgment allowed to go upon such condition, or in consideration of such agreement; that on the 14th day of October, upon the order of Wallace, the justice aforesaid issued an execution upon said judgment and placed it in the hands of Bennett, deputy of defendant Boardman, constable of said township, on the same day, telling the constable that plaintiff, Wallace, desired to see him about the execution; that, upon the constable calling upon Wallace, he was directed by Wallace to hold the execution without levy until further orders; that said constable endorsed the time of the execution coming to his hands on the day he received it, October 14th, 1874; that the constable, pursuant to the orders of Wallace, held the execution till the 20th day of October, 1874, when he was directed by the plaintiff, Wallace, to proceed with its enforcement against Borsdorfer's property, and, pursuant to said order, he levied it upon said property of Borsdorfer, described in the complaint, about half past four o'clock P. M., of said 20th day of October, 1874; that on the 5th day of October, 1874, said Borsdorfer made a general assignment under the statute of all his effects to plaintiff, Griffin, for the benefit of all his creditors, which deed of assignment was duly recorded in the recorder's office of Marion county, Indiana, on the 15th day of October, 1874, at 2½ o'clock of said day. A copy of the assignment and the bond required by law was filed in the clerk's office of said county, on the 20th of October, 1874, at 4 o'clock P. M.

“And upon the facts as found by the court in the special findings above, the court finds the following conclusions of law: That as against the assignee of Borsdorfer respecting [representing?] the creditors generally, the execution on the judgment of Wallace, in contemplation of law, was not issued to the constable for the purpose of execution, and, as against said assignee, did not constitute a lien on said property until the 20th day of October, 1874, when he was directed by Wallace to proceed under it; and that the title to said property vested in said assignee from the date of the recording of the deed of assignment in the recorder's office,

to wit, on the 15th day of October, and before the lien of said execution attached; that said assignee is entitled to the possession of said property free from the lien of said execution; and that further proceedings under said execution ought to be enjoined."

The defendants excepted to the conclusions of law. They also moved to strike from the special findings the following words: "That, upon the constable calling upon Wallace, he was directed by Wallace to hold the execution without levying till further orders. \* \* \* That the constable, pursuant to the orders of Wallace, held the execution without action until the 20th day of October, 1874, when he was directed by the plaintiff, Wallace, to proceed with its enforcement against Borsdorfer's property, and, pursuant to said order, he levied it upon the property of Borsdorfer, described in the complaint, about half past four o'clock P. M. of said 20th day of October, 1874;" for the reason that so much of said finding is not embraced in the issues of the cause. They also moved the court for a judgment on the special findings of the court dissolving the restraining order theretofore granted in the cause, and for costs. This motion was overruled, and final judgment was rendered for the plaintiff.

Errors were assigned as follows:

1. In overruling the motion to strike out part of the special findings and for judgment thereon.
2. Rendering judgment restraining the sale of the goods, etc., mentioned in the complaint.
3. The court erred in its conclusions of law upon the special finding of facts.
4. In rendering judgment for the appellee, for the reason that the complaint does not state facts sufficient to constitute a cause of action.

The court rendered its judgment against the defendants on a matter wholly outside of the pleadings. The grounds of action relied upon in the complaint are the alleged agreement on the part of Wallace to stay execution on his judgment for six months, in consideration that Borsdorfer would

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Boardman *et al.* v. Griffin.

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allow the judgment to be rendered against him in the township in which he did not reside. It was also stated that the judgment was for too large an amount. In the special finding, the court finds nothing as to the excessive amount of the judgment, and expressly finds "that there was no agreement between Wallace and Borsdorfer, that, in consideration of Borsdorfer waiving the question of jurisdiction and consenting that judgment should go, Wallace would not cause execution to issue on the judgment for six months, nor was the judgment allowed to go upon such condition, or in consideration of such agreement."

When the trial of a cause is by the court, instead of a jury, whether the court is required to find the facts specially or not, it cannot, any more than a jury can, go outside of the case made by the pleadings. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata*, or not at all. It must be so in the nature of things, so long as our mode of administering justice prevails. It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his grounds of defence, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged.

The statements in the complaint as to the excessive amount of the judgment, concerning which there appears to be no finding, do not affect the merits of the case. The judgment could not, in this way, be successfully attacked. It was a judgment duly rendered against Borsdorfer, and, unless on appeal or in some other direct mode, could not be successfully attacked by Borsdorfer or by his assignee. The court and the parties seem, very properly, to have treated these allegations as of no moment.

The court has very clearly, in the special findings, found against the plaintiff as to the case made by his complaint, and we do not see why judgment should not have been rendered against him. We do not regard the question as one

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Lowry *et al.* v. Megee.

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of variance merely, which might be obviated by an amendment under sections 94 and 95 of the civil code; but we think the case is one where the allegations of the complaint, to which the proof was directed, are unproved, not in some particulars only, but in their general scope and meaning, according to section 96.

In our judgment, the court should have rendered judgment on the finding for the defendants. In this view of the case, we do not deem it necessary or proper to express any opinion upon the question as to the effect of the delay in making the levy of the execution after it was issued.

The judgment is reversed, with costs, and the cause remanded, with instructions to render judgment for the defendants on the special findings.

Petition for a rehearing overruled.

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LOWRY ET AL. v. MEGEE.

**PLEADING.**—*Conditions Precedent.*—In an action to recover damages for the breach of a contract, if the complaint contain a general averment of performance by the plaintiff of conditions precedent, specific allegations of performance are not necessary, under our code.

**SAME.**—*Harmless Error.*—There can be no available error in sustaining a demurrer to a paragraph of answer which merely amounts to a partial denial, where an answer of general denial is pleaded.

**EVIDENCE.**—Parol evidence which tends to vary a written contract in suit is inadmissible.

**WORDS.**—*Meaning of Ascertained by the Court.*—It is the province of the court, without the aid of witnesses, to ascertain the signification of ordinary words in a written contract, such as the word "feeding," in a contract for the sale of cattle.

From the Henry Circuit Court.

J. T. Elliott, J. M. Brown, W. March and E. N. Smith,  
for appellants.

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Lowry *et al.* v. Megee.

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*L. Sexton, C. Cambern, M. E. Forkner and E. H. Bundy,*  
for appellee.

BIDDLE, C. J.—This was an action for damages by the appellee against the appellants, founded upon the following contract:

“MARCH 30th, 1871.

“This is to certify that we have, this day, bought eighty cattle of Absalom Megee, that he is now feeding, or as many of them as may live, at six dollars and fifty cents, gross, per cwt., weighed on said Megee’s scales, on demand, the last half of July next three car loads of said cattle, and two car loads from the middle of July to the last day of August next, giving said Megee three days’ notice in each lot.

“G. & F. M. LOWRY.

“Attest: J. DAUBENSPECK.”

A demurrer was filed to the complaint, alleging an insufficiency of the facts averred. The principal points alleged against it are:

1. That there is no averment of the condition of the cattle at the time of weighing, nor of the manner in which they had been fed.
2. That the averment of their value at the time of weighing is insufficient.
3. That there is no tender nor sufficient readiness to perform the contract shown.

We think the averments are sufficient. Under the code, an averment of the general performance of conditions precedent is all that is required. Sec. 84, 2 G. & H. 108; *Mason v. Seitz*, 36 Ind. 516; *The Home Ins. Co. v. Duke*, 43 Ind. 418. We must hold the complaint good.

A demurrer was sustained to the third paragraph of the answer. This is complained of, but there is no error in the ruling, even if the paragraph is good. It is no more than a partial denial. The general denial being in, the error, if any was committed, becomes immaterial.

Issues formed, trial by jury, verdict for appellee. The

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Lowry *et al.* v. Megee.

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proper steps were taken by the appellants to bring their case before this court.

Causes for a new trial numbered 1, 2, 3, 5, 6, 7, 8, 12 and 13 go to evidence offered by the appellants and rejected by the court. There is no error in this. It was parol evidence and tended to vary the written contract. This is in violation of a familiar principle. There are numerous cases deciding this point, from *Mahan v. Sherman*, 7 Blackf. 378, to *Barnes v. Bartlett*, 47 Ind. 98.

Cause numbered 4 was for refusing to admit evidence to explain the meaning of the word "feeding," as used in the agreement. This evidence was properly rejected. A court must ascertain the signification of ordinary words in a written contract, without the aid of witnesses. *Spears v. Ward*, 48 Ind. 541.

Causes numbered 9, 10, 11, 14, 15, 17 and 18 go to the evidence admitted, which tended to fix the amount of the damages. We can perceive no error in these rulings.

Cause 16 goes to evidence admitted, which tended to show what the cattle would lose in shipping to Buffalo, N. Y., by rail. This might have been irrelevant in chief, but as it was admitted in rebutting, we cannot perceive that its admission was wrong.

This disposes of all the points made in reference to the evidence.

Cause 19 goes to the refusal of certain instructions, which, we think, were substantially given in those excepted to in cause 20; which latter we regard as correct.

We have not read the entire evidence with a view to its weight, because, as to that, the appellants have not, in their brief, questioned its sufficiency to sustain the verdict.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

Petition for a rehearing overruled.

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Higgins v. The Jeffersonville, Madison and Indianapolis Railroad Co.

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HIGGINS v. THE JEFFERSONVILLE, MADISON AND  
INDIANAPOLIS RAILROAD COMPANY.

PLEADING.—*Negligence.—Injury to Person.*—A complaint against a railroad company to recover damages for an injury to the person of the plaintiff, a child of the age of seven years, caused by the negligence of the defendant's employes in the course of their employment, which failed to show, either by direct averment or by the allegation of facts, that there was no contributory negligence, was bad on demurrer.

From the Marion Circuit Court.

*Perkins, Baker & Perkins, Denny & Denny and J. M. Cropsey*, for appellant.

*Baker, Hord & Hendricks*, for appellee.

DOWNEY, J.—Suit by the appellant against the appellee. The complaint is as follows:

“Thomas Higgins, Jr., by his next friend, Thomas Higgins, Sr., admitted by the court on his written consent herewith filed, complains of the Jeffersonville, Madison & Indianapolis Railroad Company and says that said company was, at the time, when,” etc., “the owner of a certain railroad known as the Jeffersonville, Madison & Indianapolis Railroad, together with the tracks, cars, locomotives and other appurtenances and fixtures thereunto belonging; that on or about the 10th day of June, 1867, the plaintiff, said Thomas Higgins, Jr., of the age of seven years and no more, while returning from school, was upon and crossing the track of the aforesaid company, on which was standing a locomotive of said company, in the charge of the employes of said company, in the usual course of their employment; that said plaintiff then and there got upon said locomotive, and while he was so upon said locomotive engine, the said employes of said company in charge as aforesaid of said locomotive, knowing or having sufficient reason and grounds to know that said plaintiff, of the age aforesaid, was upon said locomotive, carelessly neglected to remove said plaintiff from said locomotive or to cause him to leave the same, and care-

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Shafer v. McGee.

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lessly, while said plaintiff was so upon said locomotive, within the city of Indianapolis, Marion county, Indiana, started said locomotive and run the same along the track of said road, in the regular course of business and employment, at such speed as caused the plaintiff to become frightened, and while so frightened to leap from said locomotive, which said employes carelessly and wantonly permitted him to do, and carelessly and wantonly run said locomotive over him when he jumped from said locomotive, mangling and cutting off both his legs, whereby said plaintiff is made helpless and a cripple for life, to his damage of ten thousand dollars, for which he asks judgment."

The defendant demurred to the complaint for the reason that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and final judgment was rendered for the defendant. This ruling of the court is assigned as error.

The complaint fails to show, either by an averment or by the facts alleged, that there was no negligence contributing to the injury of which the plaintiff complains. For this reason, the complaint is defective. *The Pittsburgh, etc., R. Co. v. Vining's Adm'r*, 27 Ind. 513; *The Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287; *The Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545; and *Hathaway v. The Toledo, etc., R. W. Co.*, 46 Ind. 25.

The judgment is affirmed, with costs.

Opinion filed November term, 1874; petition for a rehearing overruled November term, 1875.

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SHAFFER v. MCGEE.

From the Shelby Circuit Court.

*J. B. McFadden*, for appellant.

*K. M. Hord* and *A. Blair*, for appellee.

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Shafer v. McGee.

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DOWNEY, J.—This action was brought by the appellant against the appellee, on the 29th day of January, 1870, on a promissory note made by the defendant to the plaintiff, on the 14th day of April, 1855, and payable one day after date.

The defendant answered that, on or about the 1st day of August, 1863, he fully paid the amount of the note to the plaintiff. Reply in denial. Trial by jury; verdict for the defendant; motion by the plaintiff for a new trial overruled; final judgment on the verdict.

The overruling of the motion for a new trial is the error assigned.

These are the grounds of the motion for a new trial:

1. The verdict of the jury is contrary to the law and the evidence.

2. The verdict is not sustained by sufficient evidence.

3. That there was error of law occurring at the trial, and excepted to by the plaintiff at the time.

Nothing is urged under the last reason for a new trial. This is well enough, for it was too indefinite to present any question. It is insisted, under the other reasons, that the evidence did not justify the verdict of the jury. It is evident that the jury found for the defendant on the ground that the note had been paid by the defendant, as that was the only defence pleaded by him.

The note, as we have seen, was dated April 14th, 1855. It was for one hundred dollars, with eight per cent. interest, and payable one day after date. The defendant was the only witness testifying to the fact of payment of the note. He testified that about one year after the date of the note, he paid the plaintiff, on the note, twenty dollars, and that, in July, 1863, he sold the plaintiff a horse for one hundred and forty dollars; that the note was then said to have been lost; that the plaintiff paid him fifty-five or sixty dollars on the price of the horse, on settlement; that he told the plaintiff he was satisfied, and that the note was embraced in the settlement.

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Shafer v. McGee.

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The plaintiff, in his evidence, testified that he paid the defendant the whole price of the horse he purchased of him, and that the twenty-dollar payment was the only credit to which the defendant was entitled.

There is an evident conflict in this evidence, and it is not for us to say which party was most entitled to credit.

We can only look to the evidence of the defendant to see whether or not it made out a defence to the action.

In a year from the date of the note, it amounted to one hundred and eight dollars. The defendant then paid twenty dollars, thus leaving eighty-eight dollars. From the date of this payment until July, 1863, would be seven years and three months. The interest on the note for this time would be fifty-one dollars and four cents; added to the principal, it makes one hundred and thirty-nine dollars and four cents due on the note at the time of the sale of the horse. If the defendant received sixty dollars of the price of the horse, there was left eighty dollars to go as a credit on the note, which would leave still due on the note fifty-nine dollars and four cents, and that amount, with interest thereon from July, 1863, must have been due the plaintiff at the time of the trial, according to the defendant's own testimony.

It is true that an inference, of some strength, in favor of the theory that the note was paid, may be drawn from the lapse of time from the maturity of the note until the plaintiff sued upon it; but this inference, of itself, especially when in conflict with the defendant's statements with reference to the matter, cannot sustain the verdict of the jury.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

## HENRY ET AL. v. HUNT ET AL.

From the Randolph Circuit Court.

*J. Smith*, for appellants.

*T. M. Browne*, for appellees.

DOWNEY, J.—The appeal in this case is by a part only of the co-parties who were defendants in the circuit court, and who were affected by the judgment, without complying with sec. 551, 2 G. & H. 270, and, according to the practice of the court, must be dismissed.

The appeal is dismissed, at the costs of the appellants.

## McLAUGHLIN v. SHELBY TOWNSHIP, JEFFERSON CO.

TOWNSHIP.—*Civil and School Townships*.—When a township is mentioned by name, without the designation “school,” it must be understood to be the corporation the purpose of which is the transaction of ordinary township business, to which the term “civil” is sometimes applied, and which is a corporation entirely distinct from that of the school township existing in the same territory.

SAME.—*Contract for Erection of School-House*.—*Demurrer*.—A civil township has no authority to make a contract for the erection of a school-house; and if it sue on a contract for the erection of a school-house, the complaint, though it may state a good cause of action in favor of the school township, will be bad on demurrer.

From the Jefferson Circuit Court.

*C. E. Walker*, *W. G. Roberts*, *E. R. Wilson* and *W. T. Friedley*, for appellant.

*C. A. Korbly*, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant, upon a contract concerning the erection of a school-house. Demurrer to the complaint overruled, and exception. Such proceedings were had as that final judgment was rendered for the plaintiff below.

59	114
126	281
52	114
138	189
52b	114
1153	286
52	114
155	206
52	114
159	121

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McLaughlin v. Shelby Township, Jefferson Co.

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The appellant has assigned for error, amongst other things, the overruling of the demurrer to the complaint, and that the complaint does not state facts sufficient to constitute a cause of action.

A complaint, to be good, must state facts sufficient to constitute a cause of action in favor of the party who sues. The civil township is the plaintiff in this case, and though there may be a good cause of action stated in favor of the school township, there is none in favor of the civil township. The civil township has no authority to make contracts for the erection of school-houses. *Carmichael v. Lawrence*, 47 Ind. 554.

The contract sued upon in this case is a written one and purports on its face to have been executed between the civil township, by her trustee, and the defendant. Whether it might not be construed, or shown by averment, to have been entered into between the school township and the defendant, we do not decide. If it is to be regarded in no other light than as a contract between the civil township and the defendant, it is void for the want of power on the part of the township to enter into it. Hence, if any right of action upon it exists, it is in favor of the school township.

The counsel for the appellee, however, controvert the proposition that there are two distinct corporations in the same territory, the one being the civil, and the other the school township. Such was held to be the case in *Carmichael v. Lawrence*, *supra*. See, also, *Steinmetz v. The State*, 47 Ind. 465. Upon a re-examination of the question, we are not able to arrive at any different conclusion.

The fourth section of the act to provide for a more uniform mode of doing township business, etc., 1 G. & H. 636, provides, that "each and every township, that now is, or may hereafter be organized in any county in this State, is hereby declared a body politic and corporate, by the name and style of — township of — county, according to the name of the township and county in which the same may be organized, and by such name may contract and be contracted with,

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McLaughlin v. Shelby Township, Jefferson Co.

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sue and be sued in any court having competent jurisdiction." The object and purpose of this corporation is the transaction of ordinary township business, and though the word "civil" is no part of the name of the corporation, that term has been sometimes applied to it. When, therefore, for example, "Shelby township of Jefferson county" is mentioned, it must be understood to refer to the corporation provided for in the above statute, and not the school corporation hereinafter mentioned.

Then the first section of an act incorporating school townships, etc., 1 G. & H. 570, provides, "that each and every township that now is, or may herereafter be organized in any county in this State, is hereby also declared to be a school township, and as such to be a body politic and corporate, by the name and style of — school — township of — county, according to the name of the township and of the county in which the same may be organized, and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction." Here is a corporation created, distinct from that provided for in the act first above set out, to be denominated — school township of — county, according to the name of the township and county, with power to sue and be sued as such.

But this act did not embrace towns and cities, and it was afterwards provided, in an act approved March 6th, 1865, 3 Ind. Stat. 440-1, sec. 4, that "each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes, by the name and style of the civil township, town or city corporation, respectively, and by such name may contract and be contracted with, sue and be sued in any court having competent jurisdiction, and the trustees of such township and the trustees provided for in the next section of this act, shall, for their township, town or city, be school trustees, and perform the duties of clerk and treasurer for school purposes." This act shows unequivocally an intention on the part of the legislature to create school corpora-

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Heady v. The Vevay, Mt. Sterling and Versailles Turnpike Co.

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tions, distinct and separate from the corporations of the civil townships, towns and cities. The language is "each civil township and each incorporated town or city," etc., "is hereby declared a distinct municipal corporation for school purposes," etc. Distinct from what? Clearly from the corporations of the civil townships, towns and cities. Language could scarcely make it plainer. We see nothing in this act that changes the name of the school townships as provided for in the act previously noticed. The two statutes are consistent with each other and may stand together.

The complaint, as we have seen, states no facts giving the plaintiff any right of action, and the judgment will, for that reason, have to be reversed.

There is a brief on file in which one of the counsel for the appellant asks us, though we should decide the point thus considered for the appellant, to consider and pass upon some other questions that arose during the progress of the cause in the court below. We, however, have no time or energy to waste in the pursuit of mere abstractions, or questions not arising in the record.

The judgment below is reversed, with costs.

Petition for a rehearing overruled.

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### HEADY v. THE VEVAY, MT. STERLING AND VERSAILLES TURNPIKE CO.

TURNPIKE.—*Condemnation of Right of Way.—Notice to Justice of the Peace.*—

The charter of a turnpike company, in providing the mode of assessing damages for the condemnation of the right of way, directed the giving of notice to a justice of the peace of the county, without prescribing the form or contents of such notice.

*Held*, that the fact that a written instrument filed before a justice by said company, in a proceeding to condemn the right of way over land, after giving notice to the justice, assumed the form of a complaint against the owner of the land, did not vitiate the notice or render it bad on demurrer.

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Heady v. The Vevay, Mt. Sterling and Versailles Turnpike Co.

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**SAME.**—*Construction of Branch Roads.*—Said charter authorized the construction of branch roads, but did not prescribe the mode of condemning land therefor and assessing the damages.

*Held*, that in the construction of branch roads the regulations prescribed in the charter for the construction of the main road were applicable.

**SAME.**—*Practice on Appeal.*—In such proceeding to condemn the right of way, the land-owner demurred to said notice, or complaint, before the justice, the justice sustained the demurrer, and the turnpike company appealed to the circuit court, the charter giving either party the right to such appeal without prescribing the mode of trial in the circuit court. The demurrer was refiled in the circuit court, and was overruled, and the land-owner thereupon moved to remand the cause to the justice of the peace for the assessment of damages in the mode provided by the charter.

*Held*, that there was no error in overruling this motion.

*Held*, also, that the cause stood for trial in the circuit court *de novo*, as other appeals from justices, and it having been tried, without objection, by a jury of twelve men, no objection could be made to the mode of trial.

**NEW TRIAL.**—*Motion.*—“That the court erred in admitting testimony offered by the plaintiff and objected to at the time by the defendant,” is too indefinite a statement of a cause in a motion for a new trial.

**EVIDENCE.**—*Inspection of Premises by Jury.*—*Turnpike.*—The impressions made upon the minds of jurors by the examination of premises to which the jury has been sent for such examination do not constitute a part of the evidence in the cause; and, therefore, it was error to instruct the jury, on the trial of a proceeding to condemn the right of way for a turnpike company, that, in determining the damages, the information derived from the view had by the jury of the premises through which it was proposed to construct the road should be considered as a part of the evidence.

From the Switzerland Circuit Court.

*J. A. Works and J. D. Works*, for appellant.

*W. R. Johnston*, for appellee.

**BUSKIRK, J.**—This proceeding was instituted before a justice of the peace, to condemn the right of way over a portion of the appellant's land, to enable the company to construct a branch road. The turnpike company was incorporated by a special act of incorporation. See Local laws of 1850, page 470.

In the justice's court, the appellant demurred to the complaint, and the demurrer was sustained. The appellee appealed to the circuit court, where such demurrer was refiled and overruled. The appellant then moved the court

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to remand the cause to the justice of the peace for the ascertainment of the damages occasioned by such condemnation, in the mode prescribed by the charter, but the motion was overruled.

The cause was tried by a jury and resulted in a finding for the appellant in the sum of one hundred and ninety-five dollars, and that appellee pay the costs. A motion for a new trial was made by the appellant, and overruled.

Proper exceptions were taken to all these rulings, and proper assignments of error are made.

The first question presented for decision is, whether the court below erred in overruling the demurrer to the complaint, which was as follows:

“State of Indiana, Switzerland County:

“Before James H. Patterson, justice of the peace of said county.

“The president and directors of the Vevay, Mt. Sterling and Versailles Turnpike Company, a corporation duly and legally organized and incorporated under, pursuant to, and by the laws of the State of Indiana, to wit, an act of the General Assembly of the State of Indiana, entitled ‘an act to incorporate the Vevay, Mt. Sterling and Versailles Turnpike Road Company’ (approved January 4th, 1850), give notice to James H. Patterson, justice of the peace, as aforesaid, and complain of Edward C. Heady, and say that the board of directors of said Vevay, Mt. Sterling and Versailles Turnpike Company, deeming it to be for the best interest of said company to make a branch of their said turnpike road, have located a branch of said road, fifty feet wide, over and upon a part of the following described tract or parcel of land, situated in Jefferson township, in said county, owned by the said Edward C. Heady, to wit: a part of the northeast and a part of the southeast quarters of section 11, town 2, range 3 west, bounded as follows: commencing at a stake on the west line of the first mentioned quarter section, from which a beech tree eighteen inches in diameter bears north thirty-one minutes, distant twenty-four links, thence

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north twenty-five chains, thence east twenty-nine chains and seventy-five links, thence south twenty-four degrees east ten chains and seventy-five links, thence east seven chains and twenty-seven links, thence south fourteen chains and fifty links, thence west seven chains and seventy-three links, thence south fifteen and three-fourths minutes three chains and seventy links, thence south thirty-nine degrees east twenty-two chains and seven links, thence south twenty-five and one-half degrees east twelve chains, thence five and one-half degrees east three chains and twelve links, thence west two chains and thirty-seven links, thence south eight degrees west fourteen chains and eleven links, thence south eighty-eight and one-half degrees six chains and seventy-six links, thence south eighty-seven and one-half west seven chains and twenty-seven links, thence north forty-four and one-half degrees west ten chains, thence south seventy-four degrees west seventeen chains and fifty links, to the place of beginning, containing two hundred and six and three-hundredths of an acre, according to a survey of said lands, made March 12th, 1858, by Cornelius R. Harris, then county surveyor of Switzerland county, Indiana, except therefrom thirty-three hundredths of an acre sold and conveyed by William C. Kemp and wife to Samuel Protsman for the purpose of a road; that said branch of said turnpike is located so as to run through said above described tract of land of Edward C. Heady, as follows, to wit: commencing at a point on the line dividing the lands of said Edward C. Heady and Samuel Protsman, ten feet north forty-eight degrees west from a stake, being stake numbered twenty of the survey of said branch of said turnpike, thence north forty-eight degrees west seven hundred and ninety feet to a stake numbered twenty-eight of said survey, thence north thirty-five degrees west two hundred feet to a stake number thirty of said survey, thence north thirty west three hundred feet to a stake number thirty-three of said survey, thence north thirty-five degrees west three hundred feet to a stake number thirty-six of said survey, thence north forty-two degrees west one

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hundred feet to a stake number thirty-seven of said survey, thence north sixty-five degrees west one hundred feet to a stake number thirty-eight of said survey, thence north eighty-three and one-half degrees west one hundred feet to a stake number thirty-nine of said survey, thence seventy-three degrees west one hundred feet to a stake number forty of said survey, thence north sixty-six degrees west two hundred feet to a stake number forty-two of said survey, thence north seventy-one degrees west one hundred feet to a stake number forty-three of said survey, thence north eighty-two degrees west twenty feet, to the line dividing the lands of said Edward C. Heady and George Tardy ; the whole length of that part of said branch of said road which runs over said lands of said Edward C. Heady being two thousand three hundred and ten feet. The whole of said branch of said road is in Switzerland county; and Edward C. Heady refuses to relinquish the part of said tract of land on and over which said part of said branch of said road is located, as aforesaid, for the use of said branch of said road, and refuses to relinquish the right of way for the same over said land, as the same has been located, as aforesaid; and that said Edward C. Heady claims damage from said company therefor; and that no satisfactory contract can be made with said Edward C. Heady by said company therefor. Wherefore said president and directors of said company demand that a summons be issued to said Edward C. Heady to appear before said justice of the peace on a day to be named in the summons, and within ten days from the filing of this notice, and if the parties cannot agree, then a jury of three disinterested men of the county be summoned to assess the damage, if any, sustained by said Edward C. Heady, by reason of the location and construction of said branch of said road over and upon said lands, as aforesaid."

It is contended by counsel for appellant that the above complaint was insufficient in form and substance. It is claimed that it should have been a notice and not a complaint. The manner of assessing damages for land that has

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been condemned and appropriated is regulated by sections 20 and 21 of said charter, which are as follows:

“Sec. 20. It shall be lawful for the corporation either before or after the location of any section of said road, to obtain from the person or persons through whose land said road may pass, a relinquishment of so much of said land as may be necessary for the construction of said road or location thereof, as also the stone, gravel, wood, timber, or other materials that may be obtained on said route, or near thereto, for the benefit of said corporation; and all such contracts, relinquishments, donations, gifts, grants, or bequests made and entered into in writing by any person or persons capable in law to contract, made in consideration of such location or otherwise, and for the benefit of such corporation, shall be binding and obligatory, and the corporation may have their action in law in any court of competent jurisdiction to compel the observance of the same.

“Sec. 21. If any person or persons owning land over and upon which said road may be located shall refuse to relinquish the same for the use of said road, and claim damages from said company, and no satisfactory contract can be made with such owner by said company therefor, it shall be lawful for said company to give notice to some justice of the peace of the county in which said land is situated, and such justice shall thereupon summon the owner of said land, if a resident of the county, to appear before him on a day to be named therein and within ten days thereafter, and if the parties cannot then agree said justice shall issue a venire for summoning before him a jury of three disinterested men of the county, to be selected by said justice, and such jury, after having taken an oath or affirmation faithfully and impartially to assess the damages, if any, shall view the lands upon which said damages are claimed, and shall determine the same, duly considering the advantage and disadvantage of said road to said owner, and shall make report thereof to such justice, whereupon he shall enter judgment upon such report, from which judgment either party may

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appeal to the circuit court, but no appeal taken shall stay the proceedings of the company in opening and constructing such road over and upon such lands."

Section 21 requires notice to be served upon a justice of the peace, but it does not prescribe the form of the notice or declare what it shall contain. The instrument heretofore set out notifies the justice and at the same time complains of the owner of the land. It is full and complete, and contains a recital of all the facts which could be useful to the parties. The fact that, after serving notice upon the justice, it assumes the form of a complaint against the appellant cannot vitiate it. We think the court committed no error in overruling the demurrer to the complaint, so far as the form of it is concerned. But it is contended that the proceedings had were not authorized by the charter. The land of the appellant was condemned for the purpose of constructing a branch road, and, while the charter authorizes the construction of branch roads, it does not prescribe the mode in which land shall be condemned and the damages assessed.

Section 37 of said charter provides, that "said company may, whenever the board of directors shall deem it to be the interest of said company, make branches of said road in any direction through said county of Switzerland, and to such points in the county of Switzerland, as they may determine." It is argued by counsel for appellee that the power granted by the above quoted section to construct branch roads, by necessary implication, carries with it the same power which is given by the charter for the construction of the main road. We think the branch roads are to be constructed under the rules and regulations prescribed for constructing the main road.

It is next claimed that the court erred in refusing to remand the cause to the justice of the peace. We think there was no error in this. The justice rendered final judgment in favor of appellant.

Section 21 gives to either party the right of appeal to the circuit court. The appellee appealed. The charter does

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not prescribe how it should be tried in the circuit court. It stood for trial *de novo*, and was properly tried by a jury of twelve men. The act of May 12th, 1852, 1 G. & H. 474, provides that on appeal the case shall be tried by the viewers. *Beynon v. The Brandywine, etc., Co.*, 39 Ind. 129; *Hays v. Parrish*, at present term, *post*, p. 132. There is no such provision in the charter under examination. Hence, the case was triable as in case of other appeals from justices of the peace. Besides, there was no objection to the trial of the cause by a jury of twelve men, and this failure to object was a waiver of any objection to the mode of trial. See the case last cited and that of *Piper v. The Connersville, etc., Co.*, 12 Ind. 400.

It is also insisted that the court erred in overruling the motion for a new trial. It is claimed that the court erred in the admission of incompetent evidence. The first reason for the new trial is, that the court erred in admitting testimony offered by the plaintiff and objected to at the time by the defendant. This is too indefinite. It should have pointed out what evidence was improperly admitted. No question is presented.

¶ The giving of the second instruction is complained of. The portion complained of is as follows:

“You must determine the question of damages from the evidence before you, giving the same and each part thereof the weight you think it entitled to, and no more; as a part of the evidence in the case, such information as you derived from the view you had of the premises through which the road is proposed, and of the line of the said proposed road.”

We think the portion of the instruction above set out cannot be sustained. In *The Evansville, etc., R. R. Co. v. Cochran*, 10 Ind. 560, where a jury was sent to examine the premises, and the record contained nothing in relation to the impression produced upon the minds of the jury by the examination, it was held that the evidence was not all in the record, though the bill of exceptions stated that it contained all; in other words, it was held that the impression made

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upon the minds of the jurors by such examination constituted a part of the evidence in the cause, and that is just what the jury were told in the present case. The ruling in the above case was followed in several subsequent cases. But in *The Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545, the above case was overruled.

In the case last cited, a quotation was approvingly made from the opinion in *Close v. Samm*, 27 Iowa, 503, where the following language was used:

“It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party.”

It results that the impression made upon the minds of the jurors does not constitute a part of the evidence in the cause and cannot be considered in rendering their verdict. It is due the learned judge who presided in the court below to state that the trial was had before the decision was rendered in the above case in 40 Ind., overruling the opinion reported in 10 Ind., *supra*.

For the error in giving the above instruction, the judgment must be reversed.

The judgment is reversed, with costs, and the cause is remanded for a new trial in accordance with this opinion.

MILLER v. CAMPBELL.

STATUTE OF FRAUDS.—*Contract for Sale of Land.—Description.*—A contract for the sale of land must so far describe the land that it may be identified without resort to parol evidence. Therefore a written contract for the

59	125
127	532
52	125
138	106

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payment of a certain sum for "the one hundred and twenty acres of land in Shannon county, Missouri," at a certain date, "provided it is not sold before that time," could not be enforced.

From the Marion Superior Court.

*A. F. Denny*, for appellant.

WORDEN, J.—Action by Campbell against Miller. Complaint in three paragraphs, all based upon the following instrument, viz.:

"Mr. A. R. Miller: I will give my lot on North Pennsylvania street, and will assume encumbrance of four thousand dollars on lot No. 4 in outlot in Adamson's subdivision, in the city of Indianapolis, and will pay the twenty-eight dollars interest that is now due on the four-hundred-dollar note to the State of Indiana, you paying the interest that is now due on the three thousand six hundred dollars (being three hundred and sixty dollars), for your house and lot, situated at No. 331 North Pennsylvania street. You assume my taxes and street improvements for 1870, and I will do the same on yours, and will take possession of your property on the 20th day of October, 1870; and said Miller obligating to pay me four hundred dollars for the one hundred and twenty acres of land in Shannon county, Missouri, on the 1st day of August, 1872, provided it is not sold before that time, and Miller paying the interest on the State of Indiana note for the year 1872.

"September 22d, 1870.

"J. D. CAMPBELL.

"I accept the above proposition.

"A. R. MILLER."

A demurrer was filed to each paragraph of the complaint for want of sufficient facts, but was overruled. Exception. Such further proceedings were had as that final judgment was rendered for the plaintiff.

On appeal to the general term, the ruling at special term in overruling the demurrer was, amongst other things, assigned for error, but the judgment rendered at special

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term was affirmed. The proper error is assigned here, viz., the affirmance at general term of the judgment rendered at special term.

Each paragraph of the complaint is based upon the stipulation in the contract by which Miller was to pay Campbell four hundred dollars "for the one hundred and twenty acres of land in Shannon county, Missouri," etc.

The breach of the contract complained of, though stated in different ways in the different paragraphs, consisted of the defendant's refusal to receive and pay for the Missouri land, as stipulated for.

It is insisted by counsel for the appellant, that that portion of the contract which has reference to the Missouri land is void for uncertainty, and cannot be enforced.

This position, in our opinion, is well taken, and the objection is fatal to the complaint. It is a well settled principle, under the statute of frauds, that contracts for the sale of land must so far describe the land as that it may be identified without resort to parol evidence. See *Baldwin v. Kerlin*, 46 Ind. 426, and authorities there cited. In this case, there was no description of the Missouri land given in the contract, except that it lay in Shannon county. Doubtless the parties may have had in view a particular tract of land, containing one hundred and twenty acres, and the plaintiff may have been able to show by extrinsic evidence what particular tract was intended; but this would be to subvert and overthrow the statute.

One paragraph of the complaint sought to reform the contract; but if it could be reformed, there were no sufficient allegations to justify a reformation. See *Baldwin v. Kerlin*, *supra*, and cases there cited upon this point.

We are of opinion that the demurrer to the complaint should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

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Davis *et al.* v. Fearis *et al.*, Ex'rs.

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## DAVIS ET AL. v. FEARIS ET AL., EX'RS.

FRAUD.—*Pleading.*—*Representation Contradicting Written Agreement.*—The purchaser of a certain undivided portion of a stock of goods, at the time of the sale, executed to the seller a bond to indemnify him against the payment of a like portion of his debts and liabilities.

*Held*, in an action on said bond, on demurrer to an answer which admitted its execution, that the defendant could not therein rely upon a representation as fraudulent alleged to have been made by the seller to the buyer, at the time of the transaction, to the effect that there were no such debts and liabilities.

From the Fayette Circuit Court.

*W. Morrow* and *N. Trusler*, for appellants.

*J. C. McIntosh*, for appellees.

DOWNEY, J.—This was an action by the appellees as executors of the last will and testament of James Huston, deceased, against the appellants, on an obligation in the form of a bond of indemnity executed by the appellants to said deceased. The bond is in the penalty of three thousand dollars, and is dated August 5th, 1865. The condition recites that the deceased had sold and transferred to Jephtha Steele, Robert Marks and John S. Reid three-fourths of a stock of goods, groceries, merchandise, notes, book accounts, and fixtures, owned and held by him in the firm name of Huston & Co., in the town of Connersville, etc., in consideration, among other things, that he, the deceased, should be saved entirely harmless from all liabilities and indebtedness of the firm of Huston & Co., of every kind whatever, and concludes as follows:

“Now, if the above bounden parties shall save the said James Huston entirely harmless from three-fourths of each and all of the debts and liabilities of said firm of Huston & Co., and shall, within six months, pay or cause to be paid said debts and liabilities, then these presents shall be void, else to be and remain in full force and virtue.”

It is averred in the complaint, that said James Huston was the only member of the firm of James Huston & Co.,

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*Davis et al. v. Fearis et al., Ex'rs.*

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and, as a breach of the condition of the bond, that the defendants did not save said deceased harmless from the payment of the three-fourths of said debts of said firm, nor within six months from the date of said writing, nor at any time, pay the three-fourths of said debts; but the deceased was compelled to pay, on the 1st day of September, 1865, and did pay of said debts a debt, due by said firm to Moffitt & Blair, of four hundred and eighty-five dollars and seventy-seven cents; and, on the 2d day of September, 1865, he was compelled to pay and did pay a debt, due by said firm to Maddox Bros., of one hundred and fifty-five dollars and ninety cents, no part of which sums were paid by defendants to said deceased in his lifetime, or to the plaintiffs since his death. Wherefore, etc. The defendant Davis made default.

The complaint was held good on demurrer thereto. The defendants Steele, Marks and Reid answered in four paragraphs, the first and fourth of which were held bad on demurrer thereto for want of sufficient facts.

Reply in denial of the second and third paragraphs. The trial was by the court, without a jury. There was a finding for the plaintiffs, a motion for a new trial made by the defendants overruled, and judgment on the finding.

Errors are assigned calling in question the action of the court in overruling the demurrer to the complaint, and sustaining that to the first and fourth paragraphs of the answer, and in refusing to grant a new trial. The complaint is clearly sufficient.

In the first paragraph of the answer, the defendants pleading the same admit the execution of the bond, but say that the same was procured by the fraud of said deceased, as follows: The said deceased and William Huston, who was a silent partner of the deceased, on the 5th day of August, 1865, being the sole owners of a stock of goods, etc., in, etc., held by him under the name of Huston & Co., of the value of two thousand seven hundred dollars, sold to the defendants Steele, Marks and Reid the undivided three-fourths

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thereof, and said James Huston and these defendants, together with said William Huston, as a silent partner of said James, became partners in trade, under the name and style of "The Connersville Provision Store;" that, to induce the defendants Steele, Marks and Reid to purchase an interest in said stock of goods and become partners as aforesaid, the said deceased falsely and fraudulently represented to the defendants that there were no debts against or on account of said Huston & Co., or said Huston, on account of said business; and relying upon said representations, and having no knowledge or means of knowledge touching such indebtedness, they purchased said undivided three-fourths interest as aforesaid, and executed their notes for the full invoiced value thereof, and thereafter said business was carried on as partners as aforesaid. These defendants further aver that at the time of making the representations aforesaid, the said Huston was largely indebted, under the name and style of Huston & Co., to divers persons, amounting, in the aggregate, to three thousand dollars, of which the sums mentioned in said complaint as having been paid by said Huston form a part. Defendants further aver that after said partnership was formed the said Huston received out of the sales of goods of said firm a large amount of money, to wit, the sum of two thousand three hundred and fifty dollars, which he applied to the payment of the debts of said Huston & Co. aforesaid, or appropriated to his own use; that afterwards, to wit, on the 15th day of April, 1867, the said parties had an accounting together concerning the affairs of said partnership, when these defendants executed to said James Huston a note for four thousand five hundred dollars, embracing therein the notes given by these defendants for the original purchase-money of said undivided three-fourths interest, and also sums of money which the said Huston asserted he had paid out on account of said partnership; but they aver that the sums so paid by him were on account of his own indebtedness, and not on account of the indebtedness of said partnership; that, among other items of indebtedness embraced

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in said note of four thousand five hundred dollars, were the items mentioned in the complaint herein; that at the time of said accounting, these defendants not being informed in regard thereto, objected to signing said four-thousand-five hundred-dollar note, and refused to execute the same, whereupon said Huston promised and agreed with said defendants that, if they would execute said note, any errors that might afterwards be found should be corrected, in consideration whereof defendants executed said note; that afterwards, it having been ascertained that said sums claimed by plaintiff in this suit were embraced in said note, said Huston credited the same thereon, and thereby fully settled the same; that in addition to the sums hereinbefore set forth, said Huston received other large amounts of money belonging to said firm, for which he never accounted to said firm, to wit, the sum of two thousand dollars. Wherefore the defendants say that they are not indebted on said bond, and they pray that there may be an accounting of said partnership matters; that said William N. Huston may be made a party to this suit; that said note for four thousand five hundred dollars may be ordered to be delivered up and cancelled, and for all other proper relief.

It is exceedingly difficult to say exactly what this paragraph of the answer means. We are of the opinion, however, that the demurrer to it was properly sustained. It does not clearly show that the bond was obtained by fraud, or without consideration, nor does it amount to an answer of payment. We are at a loss to see any merit in the answer, so far as it attempts to set up fraud. It is, to say the least, exceedingly improbable that it was represented by Huston that there were no debts of the firm of Huston & Co. If he made such representation, why was it deemed necessary that the appellants should execute a bond to him by which they agreed to pay three-fourths of the amount of such debts, and save him harmless from the payment thereof? How could they be defrauded by a representation that there were no debts of the firm of Huston & Co., when the bond which

they signed clearly admits the existence of such debts, and stipulates for the payment of three-fourths thereof by them?

The fourth paragraph of the answer is as follows:

"4. For further answer, these defendants say that the indebtedness of said Huston & Co., which said Huston fraudulently represented did not exist, amounted, at the time of the execution of said bond, to the sum of, to wit, three thousand dollars, of which the amount set forth in plaintiffs' complaint formed a part; that these defendants paid and saved the said Huston entirely harmless from the said three-fourths of the whole of said debts, before notice of said fraud; that the said Huston never accounted to or paid to defendants any portion of the sum so paid by them, nor have his executors done so since his death."

There was no error in sustaining the demurrer to this paragraph of the answer. It sets forth no fraud with certainty sufficient to amount to a defence.

There is no bill of exceptions in the transcript, and no question is presented for decision under the last mentioned error assigned.

The judgment is affirmed, with five per cent. damages and costs.

### HAYS v. PARRISH ET AL.

**HIGHWAY.**—*Proceeding to Lay Out and Establish.*—*Parties.*—The fact that one who filed a petition before a board of county commissioners to lay out and establish a highway, in whose name, with the names of others who were petitioners, the case was carried on before said board and in the circuit court on appeal, did not sign said petition, was not a good ground for dismissing the case in the circuit court.

**SAME.**—In a proceeding to lay out and establish a highway, the fact that only two of the three viewers appointed by the board of commissioners took the required oath, acted and made the report, did not render the view and report insufficient.

52	132
130	99
52	132
137	208
139	20
52	132
143	179

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Hays v. Parrish et al.

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**SAME.—Oath Taken by Viewers.—Failure to Subscribe Oath.**—In such case it is not required by statute, and therefore is not necessary, that the oath taken by the viewers shall be subscribed by them.

**SAME.—Trial on Appeal.—Practice.**—In the circuit court, on appeal in a proceeding to lay out and establish a highway, it is not the practice to appoint viewers, but to try the cause *de novo* by the court or a jury.

**SAME.—Assessment of Damages.**—Where, in such proceeding, the person who appeals to the circuit court has not filed a claim for damages, either before the board of commissioners or in the circuit court, he is not entitled to an assessment of his damages; and where he is entitled to an assessment of damages, they are properly assessed by the court or jury trying the cause on appeal, and it is not error for the court to refuse to appoint three disinterested freeholders, on his motion, to assess his damages.

From the White Circuit Court.

*S. A. Huff* and *J. W. Nichol*, for appellant.

*Reynolds & Sellers*, for appellees.

WORDEN, J.—Parrish filed a petition, signed by forty-eight persons, before the board of commissioners of White county, asking for the laying out and establishing of a certain highway. The board appointed viewers, to view and report upon the proposed highway, and, upon the report being returned in favor of the public utility of the highway, it was ordered by the board that it be laid out and established.

Hays, the appellant herein, not having filed any remonstrance, or claimed any damages before the board, took an appeal from the order of the board to the circuit court. In the latter court, the cause was tried by a jury, resulting in a verdict in favor of the utility of the highway, and judgment accordingly. Hays appeals to this court, and has assigned the following errors:

“1. He says the circuit court erred in overruling his motion to dismiss the case for the want of a petition on which the proceedings of the board of commissioners were founded.

“2. The court erred in refusing to dismiss the case on the ground that the board of commissioners had no jurisdiction to establish a highway upon the report of viewers who had not

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*Hays v. Parrish et al.*

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taken and subscribed an oath that they would faithfully and impartially discharge their duty as such viewers.

“3. That the circuit court erred in refusing the motion of the appellant for the appointment of viewers by the court.

“4. The court erred in refusing to appoint, on appellant’s motion, three disinterested freeholders to assess the appellant’s damages.

“5. The court erred in overruling the appellant’s motion to set aside the verdict and judgment rendered in the cause.”

John Parrish, in whose name, with others, as petitioners, the case was carried on before the board of commissioners and in the circuit court, did not sign the petition. And it is urged under the first assignment of error, that the petition should be regarded as a nullity, and the case treated as if no petition had been filed. We are not of that opinion. The petition, as has been stated, was signed by forty-eight persons, and as the board acted upon it, appointed viewers, and ordered the highway laid out in pursuance of it, it will be presumed that there was sufficient proof before the board that enough of the signers had the necessary qualifications, although the petition was not signed by Parrish. *Little v. Thompson*, 24 Ind. 146–150.

It may have been irregular to carry on the case in the name of Parrish with others, as he did not sign the petition; but if so, this did not destroy the validity of the petition, or the jurisdiction of the board; nor was it any ground for dismissing the case. If Parrish was not a proper party, his name might have been struck out. This is all the question that properly arises under the first assignment of error. We proceed to the second.

The board appointed three viewers, two only of whom appear to have taken the required oath, and to have taken the view and made the report. It is claimed that the view and report of two only were insufficient; that the three should have acted, but that the report of the majority, when they all acted, might be sufficient. We do not concur in

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this view. We have a statute which provides, that "words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority." 2 G. & H. 337, sec. 1, clause second. This statute clearly gives the majority the right to act without the other viewer. *Cicero Hygiene Draining Company v. Craighead*, 28 Ind. 274.

The two viewers appear to have taken the oath required by statute. 1 G. & H. 363, sec. 16. But it is objected that the oath was not subscribed by them. The statute does not require the oath to be subscribed by the viewers; and where the statute does not require it, the oath need not be subscribed. *Turpin v. The Eagle Creek, etc., Gravel Road Co.*, 48 Ind. 45. This disposes of the second assignment of error.

With regard to the third, it may be observed that it is not the practice, on appeal to the circuit court in such cases, to appoint viewers, but to try the cause *de novo* in the latter court, by the court or a jury. *Kemp v. Smith*, 7 Ind. 471; *Daggy v. Coats*, 19 Ind. 259; *Sidener v. Essex*, 22 Ind. 201.

There was no error in refusing to appoint three freeholders to assess the appellant's damages, as claimed by the fourth assignment, for two reasons:

1. He had filed no claim for damages, either before the board or in the circuit court; and,

2. If he were entitled to damages, they would be properly assessed by the court or jury trying the cause on appeal.

The fifth assignment presents no question other than such as has been already considered. There is no error in the record.

The judgment below is affirmed, with costs.

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Burch v. Burch.

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## BURCH v. BURCH.

WILL.—*Legacy Charged on Land Devised.*—A devisee who has accepted real estate devised to him is personally liable for the payment of legacies expressly charged thereon.

VENDOR AND PURCHASER.—*Obligation of Grantee Under Stipulations of Deed.* Stipulations contained in a deed of conveyance of real estate, to be performed by the grantee, are not obligatory upon him unless he accepts the conveyance.

From the Fayette Common Pleas.

*G. T. Cresswell, F. S. Swift, W. Morrow, N. Trusler and J. A. Henry*, for appellant.

*T. B. Adams, F. Berry and H. Berry*, for appellee.

DOWNEY, J.—This action was by, and the judgment in favor of, the appellee against the appellant. The questions presented for decision are as to the sufficiency of the third paragraph of the complaint on which the finding ~~judg-~~ judgment were predicated, and the correctness of the ruling of the court in refusing to grant the defendant a new trial.

The third paragraph of the complaint alleges, in substance, that, in 1853, William Burch died testate; that the will was duly probated on the 24th day of June, 1857; that, by the terms of the will, the testator bequeathed to plaintiff three hundred dollars to be paid three years after the death of the testator, and five hundred dollars to be paid to him in two years after the death of the testator's widow, the said sums to be paid by the defendant, and made a charge on the real estate mentioned in the will and devised to the defendant; that the defendant elected to and did take under the will and enter into possession of the real estate, and still holds the same; that the testator has been dead more than three years, and his widow more than two years; that said sums of money are due and remain wholly unpaid, and the defendant refuses to pay the same, although often demanded of him since they became due. Wherefore, etc.

The question is whether or not the defendant is personally liable to the plaintiff for the sums of money given to

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the plaintiff in the will, or whether the plaintiff must proceed to collect the same by making them a charge upon the real estate devised, and selling it for the payment of the same. This question is also presented by the assignment relating to the overruling of the motion for a new trial.

It was stated in *Lindsey v. Lindsey*, 45 Ind. 552, that it is well settled that a devisee, who has accepted real estate devised to him, is personally liable for the payment of the legacies exclusively charged thereon. The following authorities cited in that case support the proposition:

*Dodge v. Manning*, 11 Paige, 334; S. C., 1 Comst. 298; *Elwood v. Deifendorf*, 5 Barb. 398; Willard Equity, 488, 489. We refer, also, to *Fuller v. McEwen*, 17 Ohio St. 288.

In the last named case, the defendant was the residuary legatee to whom the testator had devised and bequeathed all the residue of his property, real and personal, out of which he was to pay all the debts of the deceased. The defendant had accepted the provision made for him in the will, and the action was against him personally. The court held that the defendant was personally liable upon his promise implied by the law from his acceptance of the bequest charged by the will with the payment of the debts. Reference was made to *Gridley v. Gridley*, 24 N. Y. 130.

In the third paragraph of the answer, the defendant alleged that the matters set forth in the third paragraph of the complaint were finally settled and paid, as shown by a deed of certain real estate, executed by the defendant to the plaintiff, dated the 20th day of December, 1858, a copy of which is filed.

This deed was read in evidence on the trial, in behalf of the defendant, and is set out in an amended transcript. It is claimed that it shows a satisfaction of the bequests to the plaintiff. We set out the deed. It is as follows:

"John A. J. Burch and Ellen Jane Burch, his wife, of," etc., "convey and quitclaim to Charles M. Burch, of," etc., "all their right, title and interest in and to the following described lands, in," etc., "to wit:" (Here a tract of land

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of seventy-seven and forty-three hundredths acres is described, and the deed proceeds to say) "subject to the payment of the following annuities, which the said Charles M. Burch assumes and agrees to pay, and which are to be a lien upon and operate as a mortgage upon the real estate hereby conveyed, to wit: to Sarah Burch, widow of William Burch, deceased, the sum of sixty dollars annually, during the natural life of the said Sarah Burch, beginning at, and to be paid within, one year from the 1st day of March, 1858, and also to allow the said Sarah Burch to have one-half of the necessary firewood off the lands hereby conveyed; and also to pay to Sarah Ann Noah the sum of three hundred dollars, according to the last will and testament of said William Burch, being the legacy devised to her by said will, and made a charge upon all the estate of said testator, and to procure from the said Sarah Ann Noah a receipt against said legacy," etc.; "and also to pay Jerome Burch the sum of one hundred dollars; and to Amanda Barnsby, Edwin Barnsby and Nancy Barnsby the sum of sixty-six dollars and sixty-six and two-third cents each, according to the will of said William Burch, deceased," etc., "made a charge on all the real estate of said deceased," etc., "the condition of this conveyance being the conveyance, by the said Charles M. Burch to the said John A. J. Burch, of lands in said quarter section, of the value of four thousand dollars, the assumption of the payment by the said Charles M. Burch of the legacies and annuity in this deed mentioned, and the further consideration of a final settlement between Charles M. and John A. J. Burch of all accounts, claims and demands existing between them up to the date of this conveyance."

It appears in the evidence that the testator, William Burch, died June 24th, 1857, and that his wife died January 28th, 1867. The two hundred dollars to be paid by the defendant to the plaintiff became payable in two years after the decease of the testator, that is, June 24th, 1859; and the three hundred dollars, to be paid in three years after the

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death of the widow, became due January 28th, 1870. The deed is dated December 20th, 1858.

We have considered the question whether the language of the deed would embrace the claim in question or not, and the members of the court are not all agreed with reference to it. There is a second ground, however, on which we agree that the question must be decided against the appellant.

The second reason is, that the deed purports to have been made by the defendant to the plaintiff. The plaintiff is not a party to the deed by executing it. He, at most, could become bound only by accepting the deed and the estate to be conveyed thereby. If it be assumed that the acceptance by him of the estate mentioned in the deed would make it obligatory on him to pay the amounts and perform the acts named in the deed, which we are inclined to admit, still he could not be so bound unless he did so accept. But there is no evidence to show that the deed was ever delivered to him, or that he accepted it, or entered upon the land, or ever made any claim whatever under the deed. We think the court committed no error in not allowing the deed as proof of the satisfaction of the money for which the plaintiff sues.

As the judgment is only for four hundred and sixty-four dollars and fifty-eight cents, not an amount equal to the principal of the two amounts mentioned in the will, we may probably infer that it was for the last amount of three hundred dollars, with interest thereon. But it is immaterial how this may be in point of fact.

The judgment is affirmed, with five per cent. damages and costs.

Petition for a rehearing overruled.

Sunman v. Brewin.

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## SUNMAN v. BREWIN.

**PRACTICE.—*New Trial.*—*Costs.***—The defendant in an action having moved for a new trial for cause, the plaintiff consented that a new trial should be granted upon such terms as the court in its discretion might think just.

*Held*, that, in granting such new trial at the costs of the defendant, it was error to require the payment of the costs within a certain time.

**SAME.—*Husband and Wife.*—*Action Founded on Tort of Wife.*—*Death of Husband Before Judgment.***—Action against husband and wife for slanderous words spoken by the wife; after verdict and before further proceedings, the male defendant died, and his death was suggested to the court. *Held*, that the widow was liable to judgment against her alone.

**AMENDMENT.—*Slander.***—On the trial of an action for slander, the court permitted the plaintiff to amend the complaint by inserting, instead of the words, "Jennie (meaning plaintiff) is a nasty, dirty whore," the words, "she (meaning plaintiff) is a dirty whore."

*Held*, that there was no error in permitting the amendment.

**STATUTE OF LIMITATIONS.—*Slander.*—*Infancy of Plaintiff.***—To a complaint for slander, alleging the infancy of the plaintiff, it is not a good answer that the defendant has not been guilty within two years next before the commencement of the action.

**PLEADING.—*Slander.*—*Justification.***—In an action by a female for slanderous words containing a general imputation of whoredom against the plaintiff, an answer of justification was bad which, not alleging any specific act of whoredom on the part of the plaintiff, alleged that she was of notorious bad character for chastity, and that the words charged in the complaint were true.

From the Ripley Circuit Court.

*E. P. Ferris*, for appellant.

*J. D. Miller*, for appellee.

**DOWNEY, J.**—Action by the appellee against Thomas W. Sunman and the appellant for slanderous words alleged to have been spoken by the appellant, she being the wife of the said Thomas W. Sunman. The complaint is in three paragraphs.

In the first, the words are alleged to have been spoken in a conversation with Ann Nicely; in the second, in a conversation with Alice Stohlman; and in the third, in a conversation with Charles Vanzile. The words in every paragraph of the complaint impute to the appellee unchaste con-

duct. The defendants separately and jointly demurred to each paragraph of the complaint and to each of the sets of words. The demurrers were overruled, except as to the last set of words in the third paragraph of the complaint, and to this set the demurrer was sustained.

The defendants answered:

1. The general denial.
2. That the defendants were not guilty within two years.
3. That at the time of the speaking of the words as charged in the complaint, and before, the plaintiff was a person of notorious bad character for chastity, and that the words and declarations as charged in the complaint were true; wherefore, etc.

Demurrers to the second and third paragraphs of the answer were overruled, and the plaintiff replied by a general denial.

A trial by jury resulted in a general verdict for the plaintiff and answers to questions propounded to the jury, as follows:

"1. Did the defendant Harriet speak any of the words set out in the complaint? Answer. Yes.

"2. If yea is answered to the first interrogatory, set out the said words you find proven. Answer. She is a dirty whore.

"3. Were any words charged spoken in a conversation with Ann Nicely? If so, state what words; set them out. Yes. She is a dirty whore.

"4. Were any of the words charged spoken in a conversation with Charles Vanzile? If so, state what words; set them out. Answer. No.

"5. Did the plaintiff before the bringing of this suit, at any time, have sexual intercourse with any person, and if so, whom? Answer. No."

At this point in the case, the death of Thomas W. Sunman, since the return of the verdict, was suggested by the appellant, and thereupon she moved the court for a judgment in her favor on the special questions of fact as to the

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second and third paragraphs of the complaint, and also for a judgment in her favor on the special verdict of the jury. This motion was overruled. The appellant then moved the court for a new trial for reasons specified in the written motion; whereupon the plaintiff offered the defendant a new trial upon such terms as the court in its discretion might deem just. The court granted the new trial, on the payment of all costs by the appellant within sixty days. To the granting of the new trial on the payment of costs the appellant excepted, and demanded a new trial without the payment of costs, which the court refused, and she again excepted.

The appellant then moved in arrest of judgment, for the reasons:

1. Of the insufficiency of the complaint.

2. Because Thomas W. Sunman, one of the defendants, departed this life since the jury returned into court their verdict, and before the filing of the motion for a new trial, and hence the court has no jurisdiction of the person of the said Harriet Sunman. This motion was likewise overruled by the court. Thereupon the court rendered final judgment for the plaintiff, but provided therein that the judgment should be vacated and a new trial granted upon the payment of all costs by the defendant within sixty days from that date. The evidence and instructions of the court are in the record by a bill of exceptions.

The errors assigned are the following:

1. Overruling the demurrers to the complaint.
2. Overruling the motion for a new trial.
3. Overruling the motion in arrest of judgment.
4. In refusing to render judgment in favor of the appellant on the special verdict of the jury as to the second and third paragraphs of the complaint.
5. In rendering a judgment against Harriet Sunman on a complaint against Thomas W. Sunman and wife, after his death.

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6. Refusing to grant a new trial as a matter of right, except on the payment of costs.

There are other specifications in the assignment of errors by the appellant, but we need not notice them any more particularly.

The appellee has filed a denial of the errors assigned by the appellant, and has also assigned, as cross errors, the overruling of the demurrers to the second and third paragraphs of the answer.

1. It is conceded by counsel on both sides, as we understand the briefs, that the words which the jury found to have been spoken are contained in the first paragraph of the complaint, as amended, and also that the set of words found by the jury to have been spoken is actionable. It would appear, therefore, to be unnecessary to decide whether the words set out in the second and third paragraphs, or the words in the first paragraph not spoken, are actionable or not. The jury were required to say what words set out in the complaint had been spoken by the defendant, and to set out the words. This they did, and in doing this impliedly found that the other words had not been spoken, or that the evidence did not show that they had been spoken. Hence we do not deem it important to spend any more time in the examination of this alleged error. Nor need we examine the third alleged error relating to the motion in arrest of judgment, so far as it questions the sufficiency of the complaint. The jury found expressly that none of the words alleged in the third paragraph were spoken.

2 and 6. Various reasons for a new trial are stated in the motion, but we do not consider it necessary to examine them in detail. We think the question is not whether or not a new trial should have been granted, but whether or not the court should have imposed the condition requiring the payment of the costs within a limited time. The defendant demanded a new trial, assigning various reasons therefor. The plaintiff consented that the new trial should be granted upon such terms as the court in its discretion might think

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just. It is plainly implied in this agreement that there was cause for a new trial; but whether it should be granted at the costs of the defendant, or by allowing the costs to abide the event of the suit, was referred to the court for its decision. This question was not submitted to the uncontrolled discretion of the court, but must be decided according to law, as in any other case.

The court came to the conclusion that the defendant must take the new trial at her own costs. To this extent there was no error, that we can see, in the action of the court. But the court went further, and ordered that the costs should be paid in sixty days. According to the ruling of this court in *Cavanaugh v. The T., W. & W. R. W. Co.*, 49 Ind. 149, and *Ammerman v. Gallimore*, 50 Ind. 131, this was an error.

3 and 5. These alleged errors cannot avail the appellant. Counsel say, "this action was brought against Thomas W. Sunman for words spoken by the wife, because he was liable for the torts of the wife, and, had he lived until after judgment, the judgment would have been rendered against him alone; hence we think the complaint did not state a cause of action against her; and, if so, does his death authorize the plaintiff to proceed to final judgment against his wife alone?"

We think this is a misapprehension of the law of the case. Had the husband lived until judgment was rendered, it would have been rendered against both of them, and would have been first levied of the lands of the wife. 1 G. & H. 374, sec. 4. It is true, the husband would have been liable, if the judgment could not have been made out of the lands of the wife. The cause of action was against the wife, as well as against the husband. He having died, the wife was liable to a judgment against her alone. *Bennifield v. Hypres*, 38 Ind. 498.

The court permitted an amendment of the complaint, during the trial, by making a change in the words of one of the sets contained in the first paragraph. The words, as they originally stood, were these: "Jennie (meaning plaintiff) is

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a nasty, dirty whore." As amended, they were: "She (meaning plaintiff) is a dirty whore." We think there was no error in allowing this amendment. *Lister v. McNeal*, 12 Ind. 302.

Having come to the conclusion that a new trial should have been granted, without requiring the actual payment of the costs as a condition precedent, and consequently that the judgment ought to be reversed, we next examine the cross errors assigned by the appellee.

The second paragraph of the answer is as follows:

"The defendants, for further answer, say they were not guilty of the said supposed grievances set out in the complaint, or of any of them, at any time within two years next before the commencement of this suit. Wherefore," etc.

The ruling of the court, in holding this paragraph of the answer to be a good bar to the action, was clearly erroneous. The complaint alleges that the plaintiff is an infant. This paragraph of the answer, without controverting that fact, says the defendants were not guilty within two years. The statute did not run against the infant. 2 G. & H. 161, sec. 215. *Johnson v. Pinegar*, 41 Ind. 168, is exactly in point.

The third paragraph of the answer is as follows:

"For third and further answer, defendants say, at the time of the speaking of the words, as charged in the complaint, and before, the plaintiff, Jennie B. Brewin, was a person of notorious bad character for chastity, and that the words and declarations, as charged in the complaint, were true. Wherefore," etc.

We think the demurrer to this paragraph should have been sustained.

The trial of the cause, as shown by the bill of exceptions, is an illustration of the evils resulting from such a mode of pleading a justification. Under this answer, the defendant went into a general examination of the character and conduct of the plaintiff from the time she was ten years of age.

Without deciding that there is no slanderous charge that

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may not be justified by a simple allegation that the words spoken were true, we are clearly of the opinion that in this case such a form of justification as that adopted cannot be held sufficient. It is unfair to a plaintiff, and inconvenient to everybody connected with the trial of the cause. Assuming that the words spoken were those found by the jury to have been spoken, the defendant should have been held to the allegation and proof of some specific act or acts of whoredom on the part of the plaintiff, in justification. Such a justification, when pleaded, would be notice to the plaintiff of the particular act or acts relied upon, and would enable the court to confine the inquiry to some reasonable and proper bounds. It is necessary, although the libel or slander contain a general imputation upon the plaintiff's character, that the answer should state specific facts, showing in what particular instances, and in what exact manner, he has misconducted himself. Chit. Plead., vol. 1, p. 494, star paging. If the charge contained in the slander is specific, the defendant need not then further particularize. See form 31, 2 G. & H. 380.

The errors of the court in overruling the demurrers to the second and third paragraphs of the answer having been committed at a point in the history of the case prior to the error in refusing the new trial, the reversal must extend back to, and include, these rulings, and consequently carry costs against the appellant in this court and in the circuit court back to that point.

The judgment is reversed, at the costs of the appellant, and the cause remanded, with instructions to grant a new trial and to sustain the demurrers to the second and third paragraphs of the answer.

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Johns v. Hays *et al.*

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## JOHNS v. HAYS ET AL.

**NEW TRIAL.—Motion.—Exclusion of Evidence.**—To reserve the question of the improper exclusion of evidence, the particular evidence excluded should be pointed out and identified in a motion for a new trial.

From the Vigo Common Pleas.

*R. Dunnigan* and *A. J. Kelly*, for appellant.

*N. G. Buff*, *W. E. McLean*, *I. N. Pierce*, *G. H. Voss*, *B. F. Davis* and *J. A. Holman*, for appellees.

**DOWNEY, J.**—Action by the appellees against the appellant, for the price of lumber sold and delivered in pursuance of a written contract between the parties, the terms of which, it is alleged, were afterwards changed, by the consent of the parties, in some particulars.

A second paragraph of the complaint was for lumber and materials furnished, and work and labor done and performed, by the plaintiffs for the defendant, etc. Each paragraph refers to the same bill of particulars filed with the complaint.

Answer: 1. A general denial.

2. Payment.

3. That the agent of the defendant, who made the contract, had no power or authority to enter into the addendum to the contract relating to certain kinds of lumber; that defendant refused to ratify that part of the contract, unless the plaintiffs would deliver that lumber at a designated point, or allow the defendant four dollars and fifty cents per thousand for freighting the same; that plaintiffs agreed to this; that the parties afterwards settled on the basis of four dollars per thousand for freighting those kinds of lumber; that he paid the plaintiff eight hundred and seventy-seven dollars, and gave his notes for the balance due at the time of the settlement, which sum and notes the plaintiff accepted in full settlement and satisfaction for all the lumber mentioned in the complaint.

4. That there had been a settlement and satisfaction of the cause of action by the payment of a certain amount of

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*Johns v. Hays et al.*

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money and the giving of certain notes by the defendant to the plaintiffs, payable at a future time, the particulars of the settlement differing from those alleged in the third paragraph.

We find no reply in the record.

There was a trial by a jury, and a verdict for the plaintiff. The defendant moved for a new trial, for the reasons following:

1. Because the verdict is contrary to law and the evidence.

2. The damages are excessive.

3. Newly-discovered evidence.

4. The verdict of the jury is contrary to, and is not sustained by, the evidence.

5. Because the court erred in not admitting the defendant's evidence to go to the jury, and not permitting defendant to offer proof in defence of his case material to the defence thereof.

This motion was overruled, the defendant excepted, and final judgment was rendered against him. He has assigned as error the refusal to grant him a new trial.

It is urged by counsel for appellant, that the plaintiffs could not recover, for the reason that the complaint is on a special contract, with which it is not shown that the plaintiffs fully complied on their part. If this position would be well taken, in the absence of a general paragraph for lumber, etc., sold and delivered, it cannot be in this case, where there is such a paragraph. The plaintiffs might have recovered on one or the other of the paragraphs, or partly on each, as the evidence warranted; but whether the recovery was on one or the other, or on both, does not appear. Each paragraph was for an amount large enough to cover the verdict and judgment.

It is urged, also, that the evidence was insufficient to justify the verdict on either paragraph, and counsel speak of the preponderance of the evidence. We cannot weigh the

evidence, nor do we think the judgment below can be disturbed on this ground.

There was no case made to justify the granting of a new trial on the ground of newly-discovered evidence. We do not understand this to be urged by counsel.

If there was any evidence offered by the defendant on the trial, which was improperly excluded by the court, the particular evidence so excluded should have been pointed out and identified in the motion for a new trial. This was not done. There are several cases to this effect, and among them the following: *Terry v. Deitz*, 49 Ind. 293, and *Holmes v. The Phoenix Mut. Life Ins. Co.*, 49 Ind. 356.

The judgment is affirmed, with eight per cent. damages and costs.

MUIR ET AL. v. BERKSHIRE ET AL.

**SUBROGATION.—Equitable Assignee of Mortgage.**—A. mortgaged certain land to B., a school commissioner, to secure the payment of a loan from the school fund. Upon default, B. sold the land to C. at public sale, to pay the debt. C. sold and conveyed it, with covenants of warranty, to D., who took possession. At the suit of the heirs of A., the sale made by B. was declared void, and said heirs recovered possession. D. then sued the heirs of C. on said covenants of warranty, and recovered judgment against them, which they paid. The heirs of A. afterwards conveyed the land to E., who conveyed to F., said E. and F. having notice of all said proceedings.

**Held**, in an action brought by the heirs of C. against E. and F., for the sale of the land to pay the amount of the mortgage, that said heirs of C. were entitled to be regarded as the equitable assignees of the mortgage, and to be subrogated to the rights of the mortgagee.

**Held**, also, that the complaint of the heirs of C. against E. and F. was not bad on demurrer for not alleging facts showing that said heirs of C. were, as such heirs, actually liable to D. for the breach of said covenants of warranty in the deed made by C. to D., though E. and F. were not parties to said action of D. on said covenants.

From the Ripley Circuit Court.

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52	149
156	58

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*Muir et al. v. Berkshire et al.*

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*S. Major*, for appellants.

*J. G. Berkshire* and *H. W. Harrington*, for appellees.

BIDDLE, C. J.—The complaint in this case avers the following facts:

James Radley, in 1839, being seized of the land in question, mortgaged it to Jesse L. Holman, school commissioner, to secure the payment of one hundred dollars, borrowed from the school fund, with interest. In default of payment, the school commissioner, in 1842, sold the land at public sale, to pay the debt. James Muir became the purchaser of the land at this sale. In 1848, Muir sold and conveyed the land to John Mullen, with covenants of warranty. Mullen took possession of the land and made lasting and valuable improvements thereon. In 1862, the heirs of James Radley, who had died in the meantime, brought suit against Mullen to obtain possession of the land. In this suit the sale made by Holman to James Muir was declared void for want of proper notice, and, in 1864, the Radley heirs recovered judgment and obtained possession of the land against Mullen, who then sued the appellants as heirs at law of James Muir on the covenants of warranty in the deed of James Muir to him, and recovered judgment against them, which they paid. The Radley heirs then conveyed the land to John G. Berkshire, and Berkshire to George W. Hunter, who now claims to be the owner; of all of which proceedings Berkshire and Hunter had notice. Prayer for the sale of the land to pay the amount of the mortgage.

To the alleged insufficiency of this complaint for want of averred facts, Berkshire and Hunter filed separate demurrers, which were sustained. Exceptions and appeal were taken. The sufficiency of the complaint is the sole question in the record.

It is insisted by the appellants that they should be subrogated to the rights of the mortgagee, or held as the equitable assignees of the mortgage.

The appellees insist that subrogation can only take place between sureties, or persons in some way bound to pay the

debt to protect themselves, and should not be allowed to persons disconnected with the transaction, or mere volunteer purchasers.

The sale under the mortgage having judicially been held void, the relation of the land to the mortgage remains the same as if no sale had been made. The question, then, in the case is, who stands in the place of the mortgagee? It cannot be Holman or his representatives, because as to them the mortgage was paid by the sale of the premises.

Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim; or it arises from the transactions of principals and sureties, and sometimes between co-sureties or co-guarantors. It is not allowed to voluntary purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and never to mere meddlers. But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor. It is also allowed "for the benefit of the purchaser of an immovable, who uses the price which he paid in paying the creditors to whom the inheritance was mortgaged." Bouv. Law Dict., tit. Subrogation. In the case before us, doubtless James Muir supposed he was getting a good title to the land by the deed from Holman, and thus extinguishing the mortgage debt; and, although a voluntary purchaser, he is not a stranger to the transaction. We think, also, that the property purchased being real estate, and the purchase-money having been used "in paying a creditor to whom the inheritance was mortgaged," the purchaser should be subrogated to the rights of the original creditor. In *Johnson v. Robertson*, 34 Maryland, 165, it was held that:

"Where, under a decree of foreclosure, the mortgaged property is sold, and subsequently, on appeal, the decree is vacated, and the mortgaged property decreed to be sold again for the payment of the mortgage debt, the original

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Muir *et al.* v. Berkshire *et al.*

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purchaser, if he has paid the purchase-money, and it has been applied to the payment of the mortgage debt, is entitled to be subrogated to the mortgagee, and have the mortgage treated as assigned to him." The same doctrine is held in the following cases:

*Stackpole v. Robbins*, 47 Barb. 212; *Brobst v. Brock*, 10 Wallace, 519; and *Jackson v. Bowen*, 7 Cowen, 13.

Although the deed of Holman did not convey a good title to James Muir, yet it conveyed all the interest Holman had in the land at the time; and that interest was the right to foreclose the mortgage against it and have the mortgage debt paid out of the proceeds. We think, therefore, that the deed operated as an equitable assignment of the mortgage to James Muir. *Robinson v. Ryan*, 25 N. Y. 320.

We are aware that there are some *dicta* in the case of *Richmond v. Marston*, 15 Ind. 134, which would seem to take a narrower view of the right of subrogation than we have expressed in this opinion; but that case differed in its premises from this; besides, it was decided upon another ground. Subsequent decisions of this court, however, fully support, as we think, the principles governing us in this opinion. In *Seller v. Lingerian*, 24 Ind. 264, it was held that where a sheriff's sale was set aside for irregularity, the purchaser was entitled to recover the purchase-money paid by him at the sheriff's sale, and to have a lien declared upon the land. The following cases are also in harmony with this view: *Peet v. Beers*, 4 Ind. 46; *Hawkins v. Miller*, 26 Ind. 173; *Troost v. Davis*, 31 Ind. 34; *Spray v. Rodman*, 43 Ind. 225.

If, under such circumstances, the persons making the claim would have the right to recover back the purchase-money paid under the void sale made by Holman, as we think they would, it becomes immaterial whether they are regarded as being subrogated to the rights of the mortgagee, as the assignees of the mortgage, or merely as purchasers, or persons who have legally paid off the lien created by the mortgage.

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The statute of limitations is mooted, rather than insisted upon, by the appellees. As, by the averments in the complaint, it is not clear when the statute would begin to run, and as the case is one which might fall within some of the exceptions of the statute, perhaps the question could not be raised by demurrer to the complaint. See *Atherton v. Williams*, 19 Ind. 105; *Matlock v. Todd*, 25 Ind. 128; *Hanna v. The Jeffersonville R. R. Co.*, 32 Ind. 113; and *Perkins v. Rogers*, 35 Ind. 124.

The judgment is reversed; cause remanded, with instructions to overrule the demurrer, and for further proceedings.

ON PETITION FOR A REHEARING.

BIDDLE, C. J.—It is urged upon us, in the petition for a rehearing, that appellants, as heirs at law of James Muir, deceased, cannot recover in this action, because the liability to John Mullen, on the covenants of James Muir, should have been paid out of his general estate, and not by the appellants, as his heirs, and because “the complaint does not show that there had not been a final settlement of Muir’s estate.”

The petition states: “Now, the heirs of Muir bring suit against appellees, because one Mullen, who purchased the real estate from Muir, brought suit and recovered on the breach of covenants in the deed against them, because property had been received by them from James Muir, of greater value than Mullen’s damages. Such recovery is alleged, but we were no parties to such action. Now, we suppose that, in order to be subrogated in this case, the plaintiffs below must allege facts showing that they were actually liable to Mullen for said breach of covenant as such heirs. A judgment *inter alios* cannot answer such purpose.”

All of this might be very true, if the right of the appellants, as heirs of James Muir, to be subrogated to the equities of the mortgage made by James Radley to Jesse L. Holman depended upon their payment of the liability to Mullen on the covenants of their ancestor, James Muir; but

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it does not. Their right arises out of the fact that James Muir, their ancestor, by his purchase of the land from Holman, became the equitable assignee of the mortgage made by James Radley to Holman. Berkshire does not hold the land from Muir, nor from Mullen, nor by the same chain of title. He purchased from Radley's heirs, after the ouster of Mullen and the recovery against the appellants on the covenants of James Muir. Berkshire holds the land precisely as he would have held it, if there had been no sale by Holman and no controversy between the appellants and Mullen. The sale by Holman to Muir being void, and having been declared void by a judicial proceeding before Berkshire bought the land, he took it subject to the mortgage, and his vendee, Hunter, can take no better title than Berkshire, of all of which, as the complaint alleges, both Berkshire and Hunter had notice.

The petition is overruled.

DOWNEY, J.—So far as the foregoing opinions hold that the heirs of Muir can be subrogated to the rights of Holman under the mortgage, without showing that they were legally liable to Mullen for the damages sustained by him, and that they had paid the same to Mullen, I cannot concur therein. The appellees are not bound by the judgment of Mullen against the heirs of Muir. They were not parties to that action. *Maple v. Beach*, 43 Ind. 51. It is not enough to allege that Mullen recovered a judgment against them, but the facts rendering them liable should be averred. *McShirley v. Birt*, 44 Ind. 382. If the conveyance to Muir vested in him the equitable right to claim under the mortgage, then I do not see why the conveyance by Muir to Mullen did not carry that right on to him. How, then, could the right become vested in Muir's heirs? Only, as I think, by showing that they were legally liable to pay the damages sustained by Mullen, and that they had paid the same. These facts the complaint in question does not show, and therefore, in my judgment, it is insufficient.

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Watts v. Coxen.

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## WATTS v. COXEN.

**STRIKING OUT PLEADING.**—*Bill of Exceptions.*—A pleading which has been struck out by the court cannot again be made a part of the record, except by being set out in a bill of exceptions.

**SAME.**—There is no error in striking out a paragraph of an answer in which there is contained no matter which is not admissible under remaining paragraphs of such answer.

**NEW TRIAL.**—*Request to Instruct Jury in Writing.*—It is a good cause for a new trial, that the court, having been requested to instruct the jury in writing, gave a portion of the instructions orally.

From the Dearborn Circuit Court.

*F. Adkinson and G. M. Roberts, for appellant.*

**DOWNEY, J.**—This action was brought by the appellee against the appellant. The complaint is in two paragraphs. In the first, it is alleged that, in July, 1869, the defendant seduced and debauched the plaintiff, whereby she became sick and pregnant, and so continued until December, 1871, when she was delivered of a child (there is probably a mistake in these dates), by means of all which she was unable to perform any labor, whatever, for a long time, and incurred great expense; and that, to effect such seduction, etc., the defendant undertook and faithfully promised to marry the plaintiff, which he has refused, and still refuses to do, but has married another woman, whereby she has been damaged five thousand dollars, for which she prays judgment.

The second paragraph alleges mutual promises of marriage between the parties, in 1869, and that the defendant, in November, 1870, wrongfully married another woman, etc.

The defendant answered in six paragraphs, the third and sixth of which were struck out on motion of the plaintiff.

The first was a general denial. The second was payment, and was pleaded to the first paragraph of the complaint. The fourth alleges mutual releases, each in consideration of the other, and is pleaded to the second paragraph of the complaint. The fifth is to the second paragraph of the complaint, and alleges that, after the making of said promise in

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said paragraph set forth, the defendant learned that the plaintiff was of bad repute for chastity, and had been guilty of illicit sexual intercourse with divers men and boys, and particularly with one Thomas Jones, of all of which defendant was ignorant at the time of the making of said promise; and plaintiff, in order to induce the defendant to promise to marry her, falsely represented to him that she was a woman of good repute for chastity, and of correct and virtuous deportment, whereby she deceived the defendant, and fraudulently procured him to make the promise in said paragraph set forth, etc.

Reply in denial of the second and fifth paragraphs of the answer.

The trial was by jury, and there was a verdict for the plaintiff. A motion for a new trial was overruled, and there was final judgment on the verdict.

The errors assigned are:

1. The striking out of the third and sixth paragraphs of the answer.
2. Refusing a new trial.

We think the first alleged error cannot avail the appellant. The paragraphs struck out are not again made part of the record by proper bill of exceptions. There is a bill of exceptions in the transcript, which refers to the paragraphs struck out, but they are not set out as part of the bill, and are not, therefore, part of the record, although copied by the clerk, with the other paragraphs, in the transcript. We have, however, examined the paragraphs, and are of the opinion that they contain no matter not admissible under the remaining paragraphs. There was, therefore, no error in striking them out.

The next question is on the ruling of the court in refusing to grant a new trial.

There are several grounds on which it is contended the new trial should have been granted. We need not examine all of them. One ground was, that the court, after having been requested to instruct the jury in writing, gave a portion of

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the instructions orally. For this action of the court the judgment must be reversed. The statute imperatively requires that the instructions shall be in writing when so required. 2 G. & H. 198, sec. 324, fifth division. There are numerous decisions in accordance with this ruling.

The other questions made in the motion for a new trial may not present themselves on another trial of the cause.

The judgment is reversed, with costs; and the cause is remanded, with instructions to grant a new trial.

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COVEY, ADMINISTRATOR, v. CAMPBELL.

DEPOSITION.—*Suppression of Question for Irrelevancy.*—A question in a deposition, which may in the course of the trial become relevant, should not, before the trial, be suppressed for alleged irrelevancy.

EVIDENCE.—*Opinion of Witness as to Value of Service of Attorney.*—On the trial of an action to recover the value of services rendered by the plaintiff as an attorney in defending another action, a question is not irrelevant which seeks the opinion of a witness as to the value of such services, such opinion being founded upon the character of the case set out in the complaint filed in said other action, or upon a hypothetical case put to the witness corresponding with the real case.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

WORDEN, J.—This was a claim filed by the appellee against the estate, for services as an attorney at law, rendered by the appellee to the deceased in his lifetime, in an action in the Boone Circuit Court, wherein one Mary Hendricks was plaintiff, and the deceased was defendant. Answer, issue, trial by jury, verdict and judgment for the plaintiff.

No question is made in the case except such as arise upon the motion for a new trial.

The defendant moved for a new trial, and assigned the following causes:

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“1. That the verdict of the jury is not sustained by sufficient evidence.

“2. That the verdict of the jury is contrary to law.

“3. That the jury erred in the assessment of the amount of the recovery, the same being too large.

“4. That the court erred in refusing to quash the sixth question and answer in the deposition of C. C. Galvin, setting out the question and answer at large.

“5. For error of the court in overruling the objection of the defendant to the introduction in evidence of the question and answer above mentioned in the fourth cause.

“6. For error of the court in permitting the following question to be put to, and answered by, C. C. Wesner, Joshua G. Adams and Cyrus C. Hines, over the objection of the defendant, on the ground of ‘irrelevancy and inadmissibility,’ viz.: ‘From the character of the case set out in the complaint filed in the Boone Circuit Court, of Mary Hendricks against Jesse Hendricks, for a divorce, what would be a reasonable fee for defending said suit?’ Answer: ‘It would be worth from five hundred to a thousand dollars, taking into consideration the circumstances growing out of the charges and character of the case.’”

With regard to the first three reasons for a new trial, we may observe that it seems to us that the verdict was in accordance with law, sufficiently sustained by the evidence, and that the amount of the recovery, three hundred dollars, was reasonable and not excessive.

Before the trial, the defendant moved to suppress the sixth question and answer in the deposition of C. C. Galvin, “because of its irrelevancy,” but the motion was overruled. The question sought the opinion of the witness as to the value of the plaintiff’s services in the case in the Boone Circuit Court, the assumed nature and character of the case being put hypothetically. We are of opinion, on comparing the case thus put hypothetically to the witness with the case as shown by the complaint in the Boone Circuit Court,

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that the hypothetical case put corresponded very well with the real case.

The question was not irrelevant. Besides, it is difficult to see how the court could then determine whether the question was relevant or otherwise to the case yet to be shown by the evidence.

On the trial of the cause, the deposition was the first evidence offered, and the defendant objected to the sixth question and answer, "because the same was argumentative, leading and irrelevant," but the objection was overruled.

The question was not, in our opinion, open to either of the grounds of objection thus stated. The question was long, and it is useless to take up space by setting it out. This disposes of the fourth and fifth reasons for a new trial.

The question put to the witnesses Wesner, Adams and Hines, as stated in the sixth reason for a new trial, was clearly relevant. The word "inadmissibility," as used in that cause for a new trial, points out no ground of objection.

There is no error in the record.

The judgment below is affirmed, with costs.

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OGG ET AL. v. TATE.

**MECHANIC'S LIEN.**—*Pleading.*—The sale and delivery of materials to be used in the erection of a building and their use for such purpose could not authorize the seller to acquire a mechanic's lien on such building and the land whereon it was erected, for the unpaid price of such materials, where it did not appear that the person to whom the materials were furnished was other than a mere stranger, acting without the knowledge or consent of the owner of the land.

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137	689

From the Hancock Circuit Court.

*H. J. Dunbar*, for appellants.

*M. Marsh, R. A. Black and B. F. Davis*, for appellee.

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PETTIT, J.—This suit was brought by Warren Tate, the appellee, against the appellants, John R. Reeves, Adams L. Ogg and Letta Longnaker. The following is the substance of the complaint:

The plaintiff sold and delivered to Reeves, at his special instance and request, a quantity of lumber described, and said materials furnished to Reeves were of the value of two hundred and three dollars, for which Reeves agreed to pay the plaintiff at thirty days. And plaintiff says that said materials were so furnished in the month of September, 1871, and were furnished by the plaintiff for building a dwelling-house then being erected in Hancock county, Ind., then and now owned by Ogg and Longnaker. Said building was being erected on certain lands described, and said house is situated on said premises, and said materials were used therein. Prayer for judgment, and that it be a lien on the land of Ogg and Longnaker, and that it may be sold to pay the lien.

An account against Reeves for the amount of the lumber and a notice of a mechanic's lien are filed with the complaint. Reeves paid no attention to the case, and no judgment was rendered against him; but after issue joined as to the other defendants, there was a verdict, judgment and decree fixing a lien on their lands for one hundred and sixty-five dollars and costs, ordering sale, etc.

The sufficiency of the complaint, as to Ogg and Longnaker, is properly before us. We hold that it was not sufficient, for the reasons that it does not show or charge that Reeves was the agent, builder or architect of Ogg and Longnaker, or that they had contracted for the erection of the building or had any knowledge that materials were being furnished for building a house on their land, or that such a building was needed or would be useful on the land, or that they or either of them were residents of the county or State. We hold that a mere stranger cannot purchase materials for the erection of a house on the lands of another, without his knowledge or consent, and thereby create a mechanic's lien

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on such real estate. We need not notice other objections taken to the complaint.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the demurrer to the complaint.

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BLAKELY v. THE STATE.

**MOTION FOR NEW TRIAL.**—Motion for a new trial, “because of errors of the court in admitting evidence at the trial which prevented the defendant from having a fair trial.”

*Held*, that the cause assigned was too indefinite.

**SUPREME COURT.**—*Evidence.*—The Supreme Court will not reverse a judgment upon the weight of oral evidence.

From the Marion Criminal Circuit Court.

*W. P. Adkinson and J. M. Johnston*, for appellant.

*C. A. Buskirk*, Attorney General, *J. M. Cropsey*, Prosecuting Attorney, and *R. D. Doyle*; for the State.

**BUSKIRK, J.**—The appellant was convicted of grand larceny. The errors assigned are:

1. That the court erred in overruling the motion to quash the indictment.

2. That the court erred in overruling the motion for a new trial.

The objection taken to the indictment is, that the property alleged to have been stolen is not properly described. The objection is untenable. The description is full and sufficient in all respects. The motion was properly overruled.

Under the second assignment of error, it is claimed that the court erred in the admission of evidence. The motion for the new trial is not specific enough to present such question.

The fourth reason for a new trial is as follows:

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“Because of errors of the court in admitting evidence at the trial which prevented the defendant from having a fair trial.” What evidence was improperly admitted? Was it documentary or parol? If documentary, how is it to be identified? If parol, what was the name of the witness who gave it? or what was the substance of it? It has been too repeatedly decided that such a reason for a new trial is too uncertain and indefinite to present any question, to justify a citation of adjudged cases.

It is next claimed that the verdict is not sustained by sufficient evidence. The fact of a larceny is clearly proved. As to who committed it, there is no direct and positive evidence. It was fully shown that the appellant was in possession of the stolen property within two or three days after the larceny, and that he sold it. These facts are not denied, but are fully admitted. The defence relied upon was, that defendant came honestly into possession of the property. The defendant, when offering the property for sale, said that he had been employed by a man by the name of Hall to sell the property; and when his story was called in question, he went to the door and called in a man who answered to the name of Hall, and who claimed to be the owner of the property. The defendant testified that he was employed by Hall to sell the property, and that for his services he was to have all over one dollar and fifty cents that he realized; that he had known Hall in Chicago; that he met him on the streets of Indianapolis; that afterward he came to his house and informed him that he had some jugs of liquor and silver spoons which he wanted him to sell for him, as he was not much acquainted. They met that night. The property was found in an alley, back of a saloon. The property was shown to be worth ten or twelve dollars. It was sold for three dollars and five cents. After the sale, the defendant went to the depot with Hall, who left on a train leaving at 1 o'clock A. M. Hall was not produced as a witness, nor was any attempt made to show how he came into possession of the stolen property.

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The question submitted to the jury was, whether the defendant had honestly and truthfully accounted for how he came into possession of the stolen property. The jury, evidently, did not believe his story; for if they had, they would have acquitted him. The whole question turned upon the weight to be given to the evidence of the defendant. The jury were far more competent to determine that question than we are. We cannot reverse the judgment upon the evidence in the record.

The judgment is affirmed, with costs.

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THE LOGANSPORT, CRAWFORDSVILLE AND SOUTHWEST-  
ERN RAILWAY CO. *v.* BUCHANAN.

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RAILROAD.—*Appropriation of Land.—Evidence.*—In a proceeding to condemn and appropriate land for the way of a railroad company, the inquiry as to the value of the land should relate to the time of the appropriation, and not to the time of the trial of such proceeding.

SAME.—*Practice.—Waiver.*—If such a proceeding may be dismissed, on the motion of the land-owner, because the instrument of appropriation deposited with the clerk of the circuit court, as provided in section 15, 1 G. & H. 509, is not signed by any person in behalf of the railroad company, such objection will be waived if not made until a late stage of the proceeding.

From the Montgomery Circuit Court.

*R. B. F. Pierce*, for appellant.

*J. Buchanan, M. B. Williams and C. D. Whitehead*, for appellee.

DOWNEY, J.—This was a proceeding under section 15 of the railroad law, 1 G. & H. 509, by the appellant against the appellee, to condemn and appropriate certain lands of the appellee for the way of said company. An instrument of appropriation was deposited with the clerk of the circuit court, and appraisers were appointed, who returned their

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assessment to the clerk. The appellee excepted to the award of the appraisers, on several grounds, and, among them, the amount of the compensation allowed. The trial in the circuit court resulted in a verdict for an increased amount in favor of the appellee. A motion for a new trial was made by the appellant and overruled, and there was judgment for the amount of the verdict.

The overruling of the motion for a new trial is assigned as an error.

One of the grounds for a new trial was, that the court permitted the appellee to prove by several witnesses the value of the land taken at the time of the trial, instead of confining him to proof of its value at the time when the appropriation was made.

The instrument of appropriation was filed July 25th, 1871, and the trial took place in May, 1873. Counsel for appellee do not attempt to sustain this ruling, and it seems to us that it cannot be sustained. *Indiana Central R. R. Co. v. Hunter*, 8 Ind. 74.

The appellee has assigned a cross error, alleging that the court erred in overruling a motion made by him to set aside and dismiss the proceeding, because the instrument of appropriation was not signed by any person in behalf of the railroad company. This motion was made March 16th, 1872, after the exceptions were filed.

It is urged by counsel for the appellee, that the proceeding is *ex parte*, in derogation of private right, involving a conveyance of real estate in fee simple, without the owner's consent, and that therefore the law must be strictly complied with by the company, or it can acquire no right as against the landowner.

The language of the said fifteenth section is this:

"The corporation shall forthwith deposit with the clerk of the circuit or other court of record of the county where the land lies, a description of the rights and interests intended to be appropriated, and such land, rights and interests shall

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belong to such company, to use for the purpose specified, by making or tendering payment as hereinafter provided."

The section then proceeds to state how the rights, etc., may be acquired.

Perhaps it will be useful, in disposing of this question, to bring together the dates of the several steps taken in the cause. The instrument of appropriation, which the clerk states was filed by the attorney of the railroad company, and which recites or states that it is a description of the lands, rights and interests intended to be appropriated by the company, was filed on the 25th day of July, 1871. On the same day, the clerk issued a notice to the appellee of the filing of such instrument, and accompanying it was a copy of the instrument of appropriation. In July, 1871, the day not appearing, the appraisers were appointed and required to meet July 31st, 1871. On the 22d day of August, 1871, the appraisers filed in the clerk's office their award. On the 26th day of the same month, the appellee filed the exceptions to the award. The foregoing acts took place in vacation.

On the 12th day of September, 1871, in term, there was a rule against the company to answer the exceptions. On the 18th day of September, 1871, it was ordered that the rule to answer be set aside. On the 15th day of December, 1871, the railroad company moved the court for a change of venue, which was allowed and ordered. The change not having been perfected by the company, the appellee, on the 15th day of March, 1872, moved the court, on that account, to render judgment for all costs in the cause against the company, which motion was sustained, and the judgment rendered. On the 16th day of March, 1872, the appellee moved the court to dismiss the proceeding, because the instrument of appropriation was not signed by any one on behalf of the company.

We think that if the objection could have been successfully made at any time, a point we need not now decide, it was waived, because it was not made at an earlier stage of the proceeding. Redf. Railw., vol. 1, p. 286, 5th edition.

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The State, *ex rel.* Attorney General, *v.* Wilson.

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We are not called upon to decide in this case what should be the rule in a case where the objection that the instrument of appropriation is not subscribed is made in due time, and the objection is not waived. We hold that the cross error cannot be sustained.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

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THE STATE, EX REL. ATTORNEY GENERAL, *v.* WILSON.

BILL OF EXCEPTIONS.—*Objection to Evidence.*—Where it is not shown by bill of exceptions that a ground of objection to evidence admitted over objection was pointed out to the court below, the Supreme Court will not consider the objection.

From the Washington Circuit Court.

*J. C. Denny*, Attorney General, and *Alsbaugh & Lawler*, for appellant.

*S. B. Voyles* and *H. Heffren*, for appellee.

DOWNEY, J.—The appellant sued the appellee, and was defeated in the action.

There are two questions presented, arising under the ruling of the court in refusing to grant a new trial to the appellant, which ruling is here assigned as an error.

The first question is as to the admission in evidence of certain documentary evidence and certain testimony, on the part of the defendant, on the trial. Upon examination of the bill of exceptions, we find that, although there were objections made to the admission of this evidence, the ground of the objection was, in no instance, pointed out.

This was necessary, in order to save and present any question.

The other question involves the sufficiency of the evidence

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to sustain the finding of the court. We think the judgment ought not to be reversed on this ground.

The judgment is affirmed, with costs.

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RYAN v. THE STATE.

**CRIMINAL LAW.—Assault and Battery.—Evidence.**—If an indictment for an assault and battery allege that the battery was committed with a certain instrument, proof that it was done with a different instrument will be sufficient.

From the Martin Circuit Court.

*J. Baker*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

PETTIT, J.—Indictment for assault and battery. The charging part of the indictment is this:

“Did then and there, at the county of Martin, in the State of Indiana, in a rude, insolent and angry manner, unlawfully touch, beat, bruise and strike one William N. Waggoner; and did, then and there \* \* \* \* unlawfully shoot, strike and wound him, the said William N. Waggoner, with a gun loaded with powder and leaden shots, which,” etc.

The evidence shows that the battery was committed with a stone, and not with a gun, as alleged in the indictment; and the only question in the case is, does the evidence warrant a conviction on the indictment?

There is no necessity, in an indictment for an assault and battery, to describe the instrument with which the battery was committed; but if this is done, it is sufficient to prove that it was done with a different instrument, and this will not be a variance. 2 Bishop Crim. Proced., sec. 514; 1 Greenl. Ev., sec. 65.

The judgment is affirmed, at the costs of the appellant.

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The State v. Rollins.

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## THE STATE v. ROLLINS.

**BAIL.—***Suit on Forfeited Recognizance.—Surrender of Principal.*—Where suit had been commenced upon a forfeited recognizance, and the principal had been again arrested by the sheriff, and again bailed by the same person, the bail, by his surrender of the principal in open court and payment of all costs, before final judgment upon the forfeited recognizance, was entitled to be discharged from further liability thereunder.

From the Elkhart Circuit Court.

*C. A. Buskirk*, Attorney General, and *W. C. Glasgow*, Prosecuting Attorney, for the State.

*J. H. Baker* and *J. A. S. Mitchell*, for appellee.

**BUSKIRK, J.**—This was an action upon a forfeited recognizance.

The error assigned calls in question the action of the court in overruling a demurrer to the answer. The substantial facts averred therein are: Frank Rollins, a son of the appellee, was indicted for a conspiracy to commit a larceny. The appellee became his bail for his appearance from day to day, but, as the appellee supposed, until the next term. On the last day of the term, the principal and surety were called, and, not appearing, a forfeiture was taken. Frank Rollins went to Grand Rapids. His father knew where he was, but made no effort to bring him back. Suit was commenced on the forfeited recognizance. An *alias* writ was issued for Frank Rollins. The sheriff arrested him, brought him back, and placed him in jail. The appellee again bailed him, and then produced him in court, in discharge of his recognizance. The court held that he was discharged. The State appeals. It is provided by section 44 of the criminal code, 2 G. & H. 398, that "the bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court, or to the sheriff, and, upon payment of all costs, may thereupon be discharged from any further liability upon the recognizance."

It was shown, in the answer, that all the costs had been

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The State v. McCormick.

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paid. It is very earnestly contended by the prosecuting attorney, that the answer was bad, because the appellant had not gone after his principal and brought him back.

It is argued that the above statute was intended to relieve the surety where the principal had run away against his consent, and where he had made an honest effort to secure the return of the principal. We do not think such a construction can be placed upon the statute. It is not so expressed, nor is there anything to show such a legislative intent. The language is broad and express. The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court, or to the sheriff, and, upon the payment of costs, shall be discharged. The bail had the right to take out a bail-piece and arrest the principal in any county in the State. *Turner v. Wilson*, 49 Ind. 581. The State had a right to re-arrest the principal. We think it can make no difference how the principal was produced in court. If he was produced by the bail and costs paid before final judgment, the surety was entitled to be discharged. The court committed no error in overruling the demurrer to the answer.

The judgment below is affirmed, with costs.

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THE STATE v. MCCORMICK.

CRIMINAL LAW.—*Perjury*.—*Witness Before Grand Jury*.—An indictment for perjury may be predicated upon a false swearing before a grand jury.

SAME.—Such an indictment is bad, if it contain no allegation of any matter as having become material in the investigation before the grand jury.

From the Morgan Circuit Court.

C. A. Buskirk, Attorney General, and A. M. Cuning, for the State.

The State v. McCormick.

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DOWNEY, J.—This was an indictment against the appellee for perjury committed before a grand jury. On motion of the defendant, the court quashed the indictment. The prosecutor, on behalf of the State, appealed to this court, and has assigned as error this ruling of the circuit court. There is no brief for the appellee. There is no doubt but that an indictment for perjury may be predicated upon a false swearing before a grand jury. 2 G. & H. 450, sec. 40; *State v. Offutt*, 4 Blackf. 355.

The indictment alleges that the defendant was a witness before the grand jury, and that he was sworn by the foreman “to true answers give to all questions put to him touching violations of the criminal law of the State of Indiana;” that the foreman of the grand jury then and there asked him whether he knew of any violations of the criminal law of the State, which had taken place within the past two years, in Morgan county, and whether he knew of any unlawful sales of intoxicating liquor within said county as aforesaid, “said questions being material and proper.” The indictment then proceeds to allege that the defendant testified that he had bought intoxicating liquors of one William Dyke, in, etc., to be drunk on the premises, etc., and contains the proper averments to show that such testimony was false.

We are of the opinion that the indictment is bad, for the reason that there is no allegation of any matter which became material in the investigation before the grand jury. The statute already cited requires, in order to constitute perjury, that the false swearing shall be “touching a matter material to the point in question.” It is not alleged that any point was in question. The averment is, that certain questions were asked the defendant, and it is alleged that the questions were material and proper. There may be other defects in the indictment.

The judgment is affirmed.

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The Board of Commissioners of Henry County *v.* Slatter *et ux.*

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THE BOARD OF COMMISSIONERS OF HENRY COUNTY *v.*  
SLATTER ET UX.

CONTRACT.—*County Commissioners.—Pleading.—Judgment.—Presumption.—*

*Husband and Wife.—Parties.*—A., being the owner of certain land, on which there was a mortgage, executed a warranty deed of conveyance thereof to B. Afterwards, the mortgage was foreclosed, and, upon the sale under the decree, the land was bid off by the county commissioners for the amount of the judgment, the land being worth a much larger sum. It being claimed by A. and denied by B. that said deed of A. to B. was intended as a mortgage, or a deed of trust, it was agreed by and between A., B. and the county commissioners, at a regular meeting of the board of commissioners, after the expiration of the year for the redemption of the land from the sheriff's sale, the agreement being entered of record, that said county commissioners would pay to either A. or B., whichever should establish title to said land by an action in a court of law or equity, a certain sum, deducting therefrom the amount of the bid of the commissioners at said sale under the decree of foreclosure; that A. and B. should make deeds of conveyance of said land to the county; and that A. (who was a married woman) and her husband should deliver possession to said commissioners; and thereupon said deeds were executed, and possession was given to the commissioners, who received the sheriff's deed for the land. Afterwards, an action for possession was brought by B. against A. and her husband, which resulted in a judgment of the circuit court in favor of the defendants, who notified said commissioners of said result, and that A. was the proper person to whom to pay said balance. Suit by A. and her husband against said commissioners to recover said balance.

*Held*, that said judgment of the circuit court, which must be presumed to be in force, in the absence of any showing that it had been set aside or reversed, settled the title to the land, and entitled A. to the payment to her of said balance by the commissioners, according to the terms of said agreement.

*Held*, also, that it was not necessary to show in said complaint that the land was purchased by the commissioners for any of the purposes for which they were authorized to purchase land, a fact which must be presumed, in the absence of a contrary showing, and one which could not be inquired into except by the State.

*Held*, also, that the execution of the deed of conveyance by A. and her husband to the commissioners and the delivery of possession thereunder constituted a sufficient consideration for the agreement to pay said balance to A., which agreement was not affected by the fact that the year for redemption had expired.

*Held*, also, that it was not necessary to show in said complaint that there

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was an order of the board of commissioners authorizing said purchase at sheriff's sale by the commissioners.

*Held*, also, that said action against the commissioners was properly brought in the name of the husband and wife.

**BILL OF EXCEPTIONS.—Evidence.**—A bill of exceptions, when signed by the judge, did not contain the evidence, but stated that “upon the trial of the cause the following evidence was given, to wit: (here insert), which was all the evidence given upon the trial of said cause.”

*Held*, that the clerk, in making out a transcript of the record, had no right to insert in such bill what he supposed to be the evidence given in the cause.

**PRACTICE.—Evidence. —Judicial Discretion.**—It is discretionary with the court to permit the plaintiff to introduce proper evidence, over defendant's objection, after the close of the evidence and the argument in the cause, except the plaintiff's closing argument; and it will be presumed that evidence so introduced was competent, in the absence of a contrary showing.

From the Henry Circuit Court.

*T. B. Redding* and *W. & A. M. Grose*, for appellant.

*J. T. Elliott, W. H. Elliott, J. Brown, J. M. Brown, M. E. Forkner* and *E. H. Bundy*, for appellees.

**WORDEN, J.**—Complaint, in two paragraphs, by the appellees against the appellant.

Demurrer to each paragraph overruled, and exception. Issue, trial by the court, finding and judgment for the plaintiffs.

Error is assigned upon the ruling on the demurrers to the complaint.

We take the following statement of the complaint from the brief of counsel for the appellant:

“The first paragraph of the complaint in the circuit court alleges that Eliza Slatter, on the 29th day of March, 1870, was owner in fee of fifty acres off of a half quarter in section 4, and a half quarter in section 10, in township 17, range 10, making one hundred and thirty acres of land, in said county, and in possession of the same; that, prior to that time, a mortgage had been foreclosed upon the same, at the suit of James Calvert against the plaintiffs, Eliza Slatter and her husband, Charles Slatter, for two thousand two hundred and

fifty-five dollars, and the premises had been sold and bid off by the county commissioners for that sum, by virtue of a decretal order upon the judgment of foreclosure; that the land was worth six thousand dollars in cash; that, prior to such foreclosure, said Eliza had executed a deed to John W. Rhodes, absolute on its face, but said deed was only intended as a mortgage, or deed of trust, to secure said Rhodes in whatever loans he should make to said Eliza; that the same should be held as a mortgage, to secure Rhodes in such advances as he should make to said Eliza, as he had agreed to do, which advances were to be for the purpose of paying off said mortgage and other liens on said land; that Rhodes set up claim to the land as absolute, and refused to furnish the money to redeem, or for any other purpose, and denied the contract as to the deed being intended as a mortgage, and claimed title to the land under the deed; that Eliza gave notice to the defendant below of her version of the deed transaction with Rhodes, and his refusal to comply, as she claimed he should, and that said Rhodes had no right to redeem said land for himself, and that she, Eliza, was the true owner; that Rhodes gave a like notice to the defendant below, that he was owner and had a right to redeem, and that Eliza had no such right; that, on the 29th day of March, 1870, the Slatters, Rhodes, and the county commissioners, at a regular session of the county board, entered into a mutual agreement, between and among themselves, whereby the commissioners agreed to pay said Eliza, or said Rhodes, 'whichever should establish his or her title to said land by an action at law in a court of law or equity,' the sum of six thousand dollars, deducting said bid, interest thereon, and liens on said land, and the residue to be paid, as aforesaid, in consideration that said Eliza and Rhodes would make deeds of conveyance to the county, and Eliza and her husband deliver possession of the premises to the commissioners. It is averred that this agreement thus made was entered of record, and what is claimed as a copy is made exhibit 'A' in the complaint; that, pursuant to this agree-

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ment, the deeds were made and the possession of the land delivered, and that the county is now in possession thereof.

“The complaint then alleges that Rhodes brought his action of ejectment against the Slatters, on the — day of March, 1870, to recover the real estate described in the deed referred to in the agreement and order of the board of commissioners, it being the real estate conveyed to the commissioners, together with other real estate; that such proceedings were had that resulted in a finding and judgment for the Slatters; that said Rhodes paid costs, had a new trial, a change of venue to the Madison Circuit Court, and a like finding and judgment as before, on the — day of —, 1874, of which result the plaintiffs aver they gave notice to the county commissioners, and notified them that Eliza was the proper person to pay the balance of the purchase-money to, after deducting the said bid, interest and liens to be allowed to the county commissioners, and the amount thus due was three thousand dollars, for which they demand judgment with interest.

“The second paragraph of complaint is the common count for land sold and conveyed, without showing an order of the county board authorizing the same.

“Exhibit ‘A’ of the complaint, which is a copy of the order of the county board, recites the mortgage, foreclosure, and purchase at sheriff’s sale of the land, the fifty acres and half quarter described in the complaint, by the commissioners, on the 27th day of March, 1869; that on the 29th day of March, 1870, the land so bid off by the county commissioners, not then having been redeemed, was conveyed by the sheriff to the county commissioners. It also recites the making, on the 1st day of February, 1869, of the deed by the Slatters to Rhodes, for the land; that it was a warranty deed, and that Eliza then claimed that it was a deed of trust; and it is therein stated that the commissioners were willing to pay six thousand dollars for the land; and, after deducting the amount bid at sheriff’s sale, some interest and whatever liens were upon the land, the balance or surplus to

make up the six thousand dollars they were willing to pay to the person or persons entitled thereto, and in their order say, 'that on condition said Slatter succeeds in a court of law or equity in showing that she is entitled to said surplus, and obtains a judgment and decree therefor as against said Rhodes,' and that possession to the land be given, then the surplus is to be paid by the county to said Eliza Slatter. It is also ordered, that should said Rhodes establish his right to such surplus, then the same is to be paid to him.

"Then comes the bond of Rhodes and Yandes, by which it appears that the surplus was actually paid to Rhodes, and the bond given to refund, in case the title should prove defective or invalid.

"In the deed of the Slatters to the county, on the same 29th of March, 1870, which is exhibit 'B' of complaint, the condition on which this balance or surplus is to be paid to Eliza Slatter is stated thus:

"'And in consideration of this deed, the board of commissioners are to pay to said Eliza Slatter six thousand dollars, less all liens, mortgages, taxes, assessments and encumbrances, supposed to amount to four thousand two hundred and eighty-two dollars and ninety-seven cents, upon her obtaining a decree and judgment therefor, as against one John W. Rhodes, who claims said land. \* \* \* No money to be paid to said Eliza Slatter until she establishes her right thereto by law.'

"The deed of Rhodes to the county, also referred to in complaint, made on the 29th of March, 1870, is simply a quitclaim deed for the same land bid off at the sheriff's sale by the commissioners."

It is objected that the first paragraph of the complaint is bad, because it does not show that the land, the title to which was settled by the judgment of the Madison Circuit Court, was the same land as that purchased by, and conveyed by the appellees to, the board of commissioners. We think, however, that the allegations of the paragraph show the identity of the land. The allegation is, that Rhodes brought his

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action against the Slatters, "to recover the real estate described in the deed referred to in the agreement and order of the board of commissioners, being the real estate conveyed to the commissioners," etc. This is clearly sufficient to show the identity. The judgment of the Madison Circuit Court, which will be presumed to be in force, in the absence of any showing that it has been set aside or reversed, settled the title to the land, and entitled the appellee Eliza to the money, according to the terms of the agreement.

It is also objected to both paragraphs of the complaint, that it does not appear that the land was purchased by the commissioners for any of the purposes for which they are authorized to purchase land, and, therefore, that the contract should be held to be void. We think it may be presumed, in the absence of any showing to the contrary, that the land was purchased by the commissioners for some of the purposes for which they were authorized to purchase and hold land. Moreover, this is a question that does not concern the vendor, and can only be inquired into by the State. *Hayward v. Davidson*, 41 Ind. 212.

It is further urged, that when the contract was made, the time for redemption had expired, and the commissioners were entitled to the land by virtue of the sheriff's sale and deed, and, therefore, that the agreement of the commissioners was without consideration and void. We are of the opinion, however, that the execution of the deed by Eliza and her husband to the commissioners for the land, and the delivery of the possession of the premises, without litigation or contest in respect to the validity of the sheriff's sale, constituted a sufficient consideration for the agreement of the board of commissioners.

It is urged that there is yet another reason why the demurrers should have been sustained, viz., that it is not shown there was any order of the board authorizing the purchase of the land at sheriff's sale. This objection is entitled to no particular consideration. The plaintiff's right to recover does not depend upon the validity of the purchase by the

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commissioners at the sheriff's sale, but is based upon the agreement of the commissioners to pay as stipulated, in consideration of the conveyance by the plaintiffs to the board, and the surrender of the possession of the land.

We have thus noticed all the objections urged to the complaint, and are of opinion that they are not well taken.

There was a motion for a new trial, assigning several reasons, which need not be here stated, inasmuch as the evidence is not in the record. It is shown by the record, in response to a writ of *certiorari*, that the bill of exceptions, when signed by the judge, was an utter blank, so far as the evidence is concerned. It states that, "upon the trial of the cause, the following evidence was given, to wit: (here insert), which was all the evidence given upon the trial of said cause," etc. The clerk, in making out a transcript, had no right to insert in such bill of exceptions what he supposed was the evidence given in the cause. *Kesler v. Myers*, 41 Ind. 543; *Goodwine v. Crane*, 41 Ind. 335; *Blessing v. Blair*, 45 Ind. 546.

In addition to other questions arising upon the evidence, it is insisted that a transcript of the judgment of the Madison Circuit Court was given in evidence, without having been duly authenticated.

As we cannot regard any portion of the evidence as being in the record, the transcript thus said to have been given in evidence is not before us, and we cannot pass upon the question thus sought to be raised.

The bill of exceptions shows, that, after the close of the evidence and the argument in the cause, except the closing argument for the plaintiffs, "the court allowed the plaintiff to introduce the witness James Brown, who testified as set out in the evidence, as aforesaid." This evidence was objected to, in respect both to the time at which it was offered and the character of the evidence. We think it was discretionary with the court to permit the evidence to be given at the time it was offered, and the evidence, not being

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in the record, we cannot determine whether in itself it was objectionable or otherwise, but must presume in favor of the action of the court. The action was well brought in the name of the husband and wife. 2 G. & H. 41, sec. 8.

We have thus examined all the questions raised which are legitimately presented by the record, and find no error in the judgment.

The judgment below is affirmed, with costs and five per cent. damages.

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 BANNISTER v. THE GRASSY FORK DITCHING ASSOCIATION.
 

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**DRAINING ASSOCIATION.—*Assessment.—Pleading.***—In an action by a draining association to enforce payment of an assessment on the land of one not a member of the association, to aid in the construction of a ditch, under the law of 1869, it is not necessary that the complaint should describe the beginning, course and termination of the ditch, or show that the company divided the work into sections before its actual construction was begun, or that with such complaint should be filed the notice of the assessment, or the notice required to be posted in the recorder's office by the secretary of the company, or the order of the board of directors fixing the per cent. of the assessment which each person assessed shall pay.

**SAME.—*Schedule.***—The appraisers of benefits and injuries to lands occasioned by the construction of such ditch should, in their schedule and appraisement, show that they have included therein all lands, the intrinsic or market value of which will, in their judgment, be liable to be affected by the construction of the proposed work; and where, in their schedule and appraisement, the appraisers included merely certain lands which they alleged would be benefited, without showing that they were all the lands that would be benefited, and without showing whether any lands would be injured or not, such appraisement was invalid.

**SAME.—*Description of Land.—Judicial Notice.***—Where, in the description of land in an assessment made thereon to aid in the construction of a ditch by a draining association, it does not appear in what county the land is situated, the court may know judicially, from the congressional survey, that it is in a certain county.

**SAME.—*Notice of Assessment.***—Actual notice to a land-owner, not a member

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of such association, of the time and place of making such an assessment is not necessary. The notice may be given in a newspaper.

SAME.—*Answer. — Change of Appraisalment.*—In an action to recover the amount of such an assessment, an answer alleging that, after the appraisalment of benefits was made and returned by the appraisers, it was changed by altering assessments from less sums to larger ones, and from larger to less, without any meeting of the appraisers to equalize the same, or any advertisement for such meeting, but not showing that the defendant was injured by what was done, was bad on demurrer.

SAME.—*Evidence. — Appointment of Assessors.*—Where an appointment of assessors was made by a judge in vacation, written on the petition or on a separate paper and signed by the judge, and was not filed in court; *Held*, that it was not admissible in evidence, over objection, without proof of its genuineness.

PLEADING.—*Demurrer.*—There is no available error in sustaining a demurrer to a paragraph of an answer which amounts to no more than a general denial, when there is a remaining paragraph of general denial.

From the Grant Circuit Court.

*A. Steele and R. T. St. John*, for appellant.

*VanDevanter & McDowell and D. V. Burns*, for appellee.

DOWNEY, J.—This action was brought to enforce the payment of an assessment made upon the land of the appellant for the construction, in part, of the ditch being made by said association under the law of 1869. A demurrer to the complaint was filed by the defendant, on the ground that it did not state facts sufficient to constitute a cause of action, and overruled by the court. Exception was taken to this ruling.

The defendant then answered by the general denial and five special paragraphs.

The plaintiff demurred to the special paragraphs separately, on the ground that they did not state facts sufficient to constitute a defence to the action, and the court sustained the demurrers to the second, third, fifth and sixth, and overruled that to the fourth. Each party excepted. Reply in denial of the fourth paragraph of the answer. The issues were tried by the court, and there was a finding for the plaintiff. A motion by the defendant for a new trial was overruled, and also a motion in arrest of judgment, and there was judg-

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ment for the amount of the assessment, and for the sale of the land of the defendant for the payment thereof.

These are the errors assigned by the appellant:

1. Overruling the demurrer to the complaint.
2. Sustaining the demurrer to the second, third, fifth and sixth paragraphs of the answer.
3. Overruling the motion for a new trial.
4. Overruling the motion in arrest of judgment.

The first objection to the complaint, urged by counsel for the appellant, is, that it does not contain a description of the beginning, course and termination of the ditch. This, it is urged, is necessary, when the party whose lands are sought to be made liable is not a member of the association. We think this was unnecessary. *The Jordan Ditching and Draining Association v. Wagoner*, 33 Ind. 50; *The Etchison Ditching Association v. Busenback*, 39 Ind. 362.

The next objection urged is, that the assessment is invalid, because the schedule does not show whether any lands were injured by the making of the ditch or not. The heading of the schedule is as follows:

“The undersigned, duly appointed by the judge of the court of common pleas of Grant county, Indiana, appraisers to assess each tract of land the benefits and injury that will be sustained by the construction of a ditch by the association or company known as the Grassy Fork Ditching Association, would make the following assessment of benefits and injury to each tract, viz.:” Then follow the names of the owners, the description of the land, and the amount assessed against each tract. There is appended to the schedule an affidavit, as follows:

“We, the undersigned appraisers, being duly sworn, depose and say, that the foregoing assessment is a true, just and fair assessment of all benefits and damages that will accrue to each and every tract of land therein described, as we verily believe.”

By the sixth section of the act, the appraisers are required to “examine all lands, the intrinsic or market value of which

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may be by them supposed to be liable to be affected by the construction of the proposed work," etc., "and shall make out separate schedules," etc., "of all such lands," etc. In the schedule before us, benefits are assessed against each tract, and injuries to none. By the sixth section of the act, the assessors are required to assess the amount of benefits, without regard to the cost of the work. By the tenth section, it is provided that no more of the assessment shall be collected than shall, in the opinion of the directors, be required for the legitimate purposes of the company in the prosecution of the work.

It seems to us that the schedule in this case fails to show an assessment such as is required by law. The heading shows that it is an "assessment of benefits and injury to each tract," but does not show that the schedule embraces all the land, the intrinsic or market value of which would, in the opinion of the assessors, be liable to be affected by the construction of the proposed work, etc. The affidavit does not aid the schedule. It states that the assessment "is a true, just and fair assessment of all benefits and damages that will accrue to each and every tract of land therein described," but does not show, any more than the body of the schedule, that it contains all the land which it should embrace. The schedule shows nothing as to any lands that will be injured by the proposed work.

The schedule in this case is very different from that which was in question in *The Pigeon Creek Draining Association v. Lagrange*, 41 Ind. 272, which was held sufficient. In the schedule in that case, it appeared that all the lands benefited were embraced, and that there were none that would be injured. The schedule before us comes short in both of these respects.

It seems to us that as there is only to be collected so much of the assessment as will, in the opinion of the directors, be required for the legitimate purposes of the company in the prosecution of the work, it is essential that the schedule shall show that it contains all the lands benefited by the construc-

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tion of the work. If any can be omitted, why not a fourth, a third, or the half of them? In holding the schedule insufficient, on account of its failing to show that it embraces all the lands benefited, we go beyond the objection made by counsel, as that is confined to the omission of any statement as to lands injured. But the question is before us by the assignment of errors.

The fifteenth section of the act provides that "no informality, irregularity, or omission, which shall have occurred, or which may occur in the organization or proceedings of any company, or in the appointment or proceedings of any of their officers, agents or appraisers, shall affect the rights and privileges of such company, or invalidate the assessment of the appraisers, nor any sale of land which shall be made under any foreclosure of any lien for the assessment thereon, provided the amount of the assessment shall be clearly set forth in the appraisers' schedule, and the schedule shall have been duly recorded, and notice of the recording thereof given as hereinbefore provided." What effect has this section on the defects which we have found in the schedule? In our opinion, it cannot have the effect to cure such wide departures from the requirements of the statute as exist here. We think the schedule and assessment ought to show that the assessors have included all the lands, the intrinsic or market value of which will, in their judgment, be liable to be affected by the construction of the proposed work. The failure to do this can not be regarded as such an informality, irregularity, or omission as is contemplated by section 15.

The sixth section of the act also contemplates that a schedule of the lands injured and the amount of the injury shall be made separate from the schedule and assessment of the lands benefited.

In *The Jordan Ditching and Draining Association v. Wagoner, supra*, it was held that a general statement that no lands were damaged was sufficient. But even that does not appear in the schedule, etc., in the case under consideration.

It is next objected to the assessment that it does not suffi-

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ciently describe the lands of the appellant, on which it is sought to enforce the lien. The description in the complaint is as follows: "The northeast quarter of the southeast quarter of section 30, township 23 north, range 7 east." In the schedule it is as follows:

"John Bannister, northeast southeast section 30, township 23 north, range 7 east. Benefits to said tract of land, sixty dollars."

The particular objection to the description is, that it does not appear in what State and county it is situated. We know judicially that the land is in Grant county, from the congressional survey. *Turpin v. The Eagle Creek, etc., Co.*, 48 Ind. 45. And see *The Jordan Ditching and Draining Association v. Wagoner, supra*. There are other indications that the land is in Grant county, Indiana, although the fact is not expressly stated.

It is next insisted that, as the notice of the assessment was essential to the plaintiff's case, a copy of it should have been filed with the complaint. We think there is nothing in this objection to the complaint. The notice is not such an instrument as the statute contemplates. 2 G. & H. 104, sec. 78.

The same may be said as to the notice required to be posted in the recorder's office by the secretary of the company.

We think the same rule applies with reference to the order made by the board of directors fixing the per cent. of the assessment which each person assessed should pay, and that a copy of it need not be filed.

It is further objected to the complaint, that it does not show that the company divided the work into sections before the actual construction of the work was begun, according to section 8 of the act. We think there is no merit in this objection.

We are next to examine the answers.

The second paragraph alleges that the defendant was not, at any time, a member of the association, and that he never had any actual notice of the time and place of making the

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assessment; that the estimate made and returned by the engineer was larger than the aggregate amount of benefits assessed; that no new or re-assessment was made by them or other appraisers, and that he never had any notice whatever of any meeting of said assessors to equalize such assessment.

Our attention is not directed to any authority which will sustain this answer, so far as it relates to a want of actual notice. We do not find that actual notice of the time and place of making the assessment is required. The notice may be given in a newspaper. Section 9.

Section 7 of the act is as follows:

“Sec. 7. Before the actual construction of the work shall be begun, surveys of it, and estimates of its costs shall be made, and the appraisers’ schedules of assessments returned to the secretary; and if the estimated cost of the work shall exceed the aggregate amount of the assessments, the work shall not be further prosecuted.”

Counsel for appellee say, first, that this paragraph of the answer is no more than the general denial which was in; and, second, that, to make it good, the defendant should have alleged that he was damaged, or likely to be damaged, by reason of the inadequacy of the assessment to complete the work.

The complaint states the amount of the estimate of the cost of construction of the work, and that it was less than the assessments. We think, therefore, that the general denial put the matter in issue, and that the special paragraph of answer on that subject was unnecessary. There was, for this reason, no available error in sustaining the demurrer to it.

The third paragraph of the answer alleges, that the defendant is not a member of the association; that he had no actual notice that the appraisers would, at any time or place, meet to begin and make the assessment; that when said appraisers were on the line of the ditch, on the day named in the notice published in a newspaper in said Grant county, this defendant and others, whose lands have been assessed, were pres-

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ent with said appraisers, and asked of them if they were appraising the benefits and damages to their lands; and that said appraisers informed them that they were not assessing benefits and damages to be incurred in consequence of the construction of said ditch, and that thereupon the defendant and others went away and gave no attention to the action of said appraisers; and defendant avers, that if there was any other assessment made by said appraisers, no notice was given of the time and place of making the same.

We are of the opinion that the court committed no error in sustaining the demurrer to this paragraph of the answer. Perhaps the appraisers had completed the assessment before the inquiry was made of them; or perhaps they were then only engaged in making a reconnoissance of the ground preparatory to the making of the particular assessments. There is not enough disclosed, we think, to affect the assessment.

The fifth paragraph of the answer avers, that the defendant is not a member of the association; that the schedule does not contain all the lands benefited by said ditch. The paragraph designates by their proper description one quarter section of land and one forty-acre tract, which are omitted, and gives the names of the owners, which are alleged to be benefited, and are not in the schedule; and that defendant had no actual notice of the time and place of making the assessment.

This paragraph presents the same question, in a little different form, as that considered in speaking of the complaint, and need not be further considered. We need not decide whether, if the schedule, on its face, showed that it embraced all the lands which, in the opinion of the appraisers, were benefited, the fact could be controverted in this way.

The sixth paragraph of the answer alleges, that, after the appraisement of benefits was made and returned by the appraisers, the same was changed, in this, that the assessments were altered from lesser to larger sums, and from larger to lesser sums, without any meeting of the appraisers

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to equalize the same, and without any advertisement for such meeting.

We think this answer is bad, for the reason that it does not show that the defendant was in any way injured in consequence of what was done.

The only question presented under the motion for a new trial is, whether the court erred in allowing the plaintiff to introduce and read in evidence the written appointment of the assessors by the judge of the common pleas. A petition to the judge, asking him to appoint the appraisers, was given in evidence. The appointment appears to have been made by the judge at chambers, on a separate paper, or perhaps written on the petition. The objections were, that it was not the best evidence, was not in any manner authenticated, and because the signature of the judge was not proved, he being long since out of office, and because no copy of such appointment had been served on the defendant, was not matter of record in the common pleas court, and was not made a part of the complaint.

The sixth section of the act authorizes the circuit court, or the common pleas, in term, or a judge thereof in vacation, to make the appointment. Was this paper properly admitted in evidence? We think it was not. The appointment of the appraisers was an act done by the judge, out of court. The paper was not filed, or required to be filed, in any court. It seems to us that the genuineness of the paper should have been proved, when the objection was made, before it was admitted in evidence.

The judgment is reversed, with costs; and the cause is remanded, with instructions to sustain the demurrer to the complaint.

## Mills v. The State.

## RICH ET AL. v. THE GRASSY FORK DITCHING ASSOCIATION.

From the Grant Circuit Court.

A. Steele and R. T. St. John, for appellants.

VanDevanter & McDowell and D. V. Burns, for appellee.

DOWNEY, J.—On the authority of *Bannister v. The Grassy Fork Ditching Association*, at the present term, *ante*, p. 178, this cause, which involves the same questions as were decided in that case, is reversed, with costs; and the cause is remanded, with instructions to sustain the demurrer to the complaint.

## MILLS v. THE STATE.

CRIMINAL LAW.—*Indictment Charging Distinct Offences.—Election Between Charges.*—Where a count of an indictment charges more than one substantive offence, or where different counts charge different substantive offences, the election of the State to place the defendant on trial for one of the offences so charged amounts to an abandonment of the other charges, which thereupon cease to be parts of the indictment, as if, as to the counts or parts of counts containing them, the court had sustained a motion to quash, or the prosecutor had entered a *nolle prosequi*.

SAME.—*Rape.—Assault and Battery. — New Trial.*—Indictment charging that, at, etc., on, etc., A. B. “did, in a rude, insolent and angry manner, unlawfully touch, strike and wound” C. D., “a woman, and did, then and there, her, the said” C. D., “a woman, unlawfully, forcibly and against her will, feloniously ravish and carnally know.”

Under an order of court requiring the prosecuting attorney to elect whether he would put the defendant on trial for a rape or for an assault and battery, he elected to try him for a rape. There was a verdict of guilty of an assault and battery; and, on the defendant's motion, a new trial was granted.

*Held*, that the indictment charged only one substantive offence, that of a rape.

*Held*, also, that the election to place the defendant on trial for a rape, with the order requiring such election, was a nullity, and did not take out of the case the charge of an assault and battery necessarily included in the

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charge of a rape, which minor offence need not be separately charged in an indictment for the greater.

*Held*, also, that the defendant took said new trial as to the whole case, and it was error to sustain his objection to being tried thereon for a rape, and to put him on trial for an assault and battery.

From the Lagrange Circuit Court.

*A. Ellison and A. A. Chapin*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

BUSKIRK, J.—The appellant in this cause was prosecuted and tried on the following indictment:

“State of Indiana, Lagrange county, ss. In the March term of the Lagrange Circuit Court, A. D. 1874. *The State of Indiana v. Jacob Mills*.

“The grand jurors for the county of Lagrange, upon their oath, present that, at said county and State, on the 24th day of April, A. D. 1872, Jacob Mills did, in a rude, insolent and angry manner, unlawfully touch, strike and wound Lovinna Draggoo, a woman, and did, then and there, her, the said Lovinna Draggoo, a woman, unlawfully, forcibly, and against her will, feloniously ravish and carnally know.

“CYRUS M. WADE, Special Pros. Att’y.”

At the March term, 1874, of the Lagrange Circuit Court, the appellant, before pleading, moved to strike out of the indictment that portion which charges a simple assault and battery, which motion was overruled, and exception taken. He then moved the court to compel the prosecutor to elect on which charge contained in the indictment he would try the appellant, which motion was sustained, and the prosecutor elected to try him upon the charge of rape alone. Appellant then moved to quash the indictment, which was overruled, and exception taken.

He was then arraigned, and pleaded not guilty, and was tried by a jury, who returned the following verdict:

“We, the jury, find the defendant guilty of assault and battery, and fix his fine at eight hundred dollars, and four months’ imprisonment in the county jail.

“T. G. STARKEY, Foreman.”

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The defendant then moved to be discharged from further prosecution, for the reason that the verdict of the jury operated as an acquittal, which was overruled, and exception reserved.

A motion was then made for a new trial, which was granted, and the cause continued.

At the next term, the cause being called for trial, appellant objected to being again put on trial, and filed his reasons therefor, in writing, but the objection was overruled, and exception was taken.

He then objected to being put on trial for rape, which the court sustained. He next objected to being put on trial for assault and battery, with intent to commit a rape, which was also sustained; and he then objected to being put on trial for an assault and battery, which was overruled, and exception taken.

The defendant, over his objection, was arraigned, and, refusing to plead, the court entered a plea of not guilty for him, and placed him on trial, and a trial was had, and a verdict returned of guilty of assault and battery.

Motion for a new trial was again made and overruled, and then in arrest of judgment, which was also overruled, and judgment rendered on the verdict.

It is strenuously insisted by counsel for the appellant, that the indictment, consisting of a single count, contained two substantive offences, the one for an assault and battery, and the other for a rape.

It is further contended, that the election made by the prosecuting attorney was the equivalent of a *nolle prosequi*, or a quashal, and was an abandonment of the charge of an assault and battery, whether as a substantive charge or as embraced in the charge of rape.

It is firmly settled by the authorities, that where one count contains two substantive offences, or where several substantive offences are charged in different counts, and the State elects to place the accused upon trial for one of such offences, such election amounts to an entire abandonment of

the charge for which the State refuses to place the accused upon trial, and such offence ceases to constitute a part of the indictment, in the same manner and to the same extent as if the prosecutor had entered a *nolle prosequi*, or the court had quashed the count, or a part of the count, containing such offence. When an election is made, the accused is entitled to a discharge as to the offence for which he is not placed on trial. Nearly all of the text writers and adjudged cases speak of an election as the equivalent of quashing by the court or entering a *nolle prosequi* by the prosecuting attorney.

1 Bishop Crim. Pro., sec. 455, lays down the doctrine thus:

“One mode of enforcing what is equivalent to an election is to quash the indictment before trial, when it appears to the judge that offences have been unduly joined, and that the prisoner will be thereby prejudiced on his trial.”

The same author, in section 456, says:

“Returning to what may be termed election proper, we find various sorts of election, and various cases, to be distinguished from one another. In the first place, the prosecuting officer may always *nol. pros.* any count of the indictment before the trial commences, or after it is over, though he cannot do this while it is in progress. He may, therefore, in analogy to this, elect to proceed only on certain counts of the indictment.”

The prosecuting officer may, on the trial, be required to elect on which count he will proceed, or to what transaction the evidence shall be restricted. See sections 459–460 of the above cited work. The author, in section 460, says:

“Where there is a single count in an indictment for a misdemeanor, as well as in an indictment for felony, whatever the number of counts, the court will restrict the prosecutor, by so compelling him to elect as shall prevent his giving evidence of more than the one transaction. And where in misdemeanor there are several counts, the evidence will be limited in a corresponding way, regard being had to the number and nature of the counts.”

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The doctrine, as stated above, is fully supported by the adjudged cases. *McGregg v. The State*, 4 Blackf. 101; *Weinzorpflin v. The State*, 7 Blackf. 186; *The State v. Smith*, 8 Blackf. 489; *Engleman v. The State*, 2 Ind. 91; *Joy v. The State*, 14 Ind. 139; *The State v. Jones*, 5 Ala. 666; *Burk v. The State*, 2 Har. & J. 426; *The People v. Austin*, 1 Parker C. C. 154; *Bailey v. The State*, 4 Ohio St. 440; *The State v. Davis*, 29 Mo. 391; *Dowdy v. Commonwealth*, 9 Grat. 727; *The United States v. Dickinson*, 2 McLean, 325; *Hampton v. State*, 8 Humph. 69; *Storrs v. The State*, 3 Mo. 9; *Rex v. Young*, Peake Ad. Cas. 228; S. C., Russ. & Ry. 280; *Rex v. Smith*, 3 Car. & P. 412; *The State v. McPherson*, 9 Iowa, 53; *Mayo v. The State*, 30 Ala. 32; *The State v. Fowler*, 8 Foster, N. H. 184; *The State v. Flye*, 26 Me. 312; *The State v. Phinney*, 42 Me. 384; *Baker v. The State*, 4 Pike, 56; *Kane v. The People*, 8 Wend. 203.

The case of *Joy v. The State*, 14 Ind. 139, is very much in point in the case under examination. There the indictment contained two counts for murder in the first degree. After the jury was empanelled and sworn, the defendant moved the court to require the prosecutor to elect on which count he would put him on trial. The court required the election. The prosecutor elected to go to trial on the first count. The defendant then moved to quash the first count. The motion was sustained. The prosecutor then asked and obtained leave to enter a *nolle prosequi* to the second count. The jury was discharged, and the defendant held in custody to answer a new indictment. A new indictment was returned. The defendant pleaded, in bar of the new indictment, that he had been placed in jeopardy upon the first. A demurrer was sustained to the plea. This court held that he was not in jeopardy as to the first count, because that had been quashed upon his own motion, and hence he had waived his privilege, and that his jeopardy under the second count terminated as soon as the election was made.

This ruling can be sustained only upon the principle that, by the election, the second count went out of the indictment,

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and the crime charged therein ceased to be a substantive offence upon which he could be placed on trial under the first indictment. The court, in rendering its decision, entirely ignored the fact that a *nolle prosequi* had been entered to the second count after the election, and placed its ruling upon the second count, upon the ground that the defendant's jeopardy had ceased, under that count, from the moment the election was made.

It becomes necessary for us to inquire whether the indictment contained two substantive offences, and if we should arrive at the conclusion that it only contained one substantive charge, we will then be required to determine whether the election of the prosecutor to place the accused on trial for rape took out of the case the charge of an assault and battery embraced within the charge of rape.

The rule in reference to the joinder of separate and distinct offences in the same count is accurately and clearly stated in *The State v. Smith*, 61 Me. 386; S. C., 2 Green Crim. Rep. 462, where it is said:

"No rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offences in the same count. A substantive offence is one which is complete of itself, and is not dependent upon another. When several acts relate to the same transaction, and together constitute but one offence, they may be charged in the same count, but not otherwise. Each count in an indictment must stand or fall by itself. The jury cannot find a verdict of guilty as to one part, and not guilty as to another part of the same count. This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce." See, also, *State v. Palmer*, 35 Me. 9; *State v. Burgess*, 40 Me. 592; *Mershon v. The State*, 51 Ind. 14, where the Indiana cases are collected.

The indictment in the present case charges, in the first instance, an assault and battery, and then charges a rape.

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By the use of the words, "and did, then and there," etc., it is made plainly to appear that it was one and the same transaction.

In the extract above made, it is said: "A substantive offence is one which is complete of itself, and is not dependent upon another." An indictment for a rape is good without charging an assault, or an assault and battery. Every charge of rape necessarily includes a charge of an assault and battery. The word "rape" imports not only force and violence on the part of the man, but resistance on the part of the woman. 2 Bishop Crim. Proced., sec. 955; *O'Connell v. The State*, 6 Minn. 279; *Regina v. Allen*, 2 Moody, 179; S. C., 9 Car. & P. 521.

We are of opinion that the indictment did not contain two substantive offences. It contained only a charge of rape. There was no case for an election. The whole action of the court in ordering, and the prosecutor in making, an election is to be treated as a nullity.

It is claimed that the court erred in overruling the motion to quash the indictment. It is argued that, after the election was made, there was no charge of an assault, or an assault and battery, and hence the indictment was bad. We have already seen that an indictment for a rape is good without a charge of the minor offence. The court committed no error in overruling the motion to quash the indictment.

We next inquire whether the court erred in refusing, after the new trial was granted upon the application of the appellant, to place him on trial for the charge of rape, and in placing him on trial for an assault and battery.

These questions are too plain to require much elucidation. When the appellant asked and obtained a new trial, he took it as to the whole case. He was tried, in the first instance, upon the charge of rape. The jury had a right to find him not guilty of that offence, but guilty of an assault and battery, which was embraced in the charge of a rape, and if

judgment had been rendered on such verdict, it would have been a bar to another trial for the charge of rape. But the appellant asked and obtained a new trial, and this placed him in the same position as though no trial had been had. *Ex Parte Bradley*, 48 Ind. 548, and the numerous authorities there cited.

The court erred in refusing to place the appellant upon trial for the charge of a rape. The action of the court in refusing to place the appellant on trial for rape did not have the effect of quashing the indictment. It remained in full force and effect, and now stands as a valid charge of rape against the appellant.

As we have seen, there was no express and substantive charge of an assault and battery against the appellant, upon which he could have been placed upon trial. The charge of assault and battery, which was embraced in the charge of rape, did not constitute a substantive offence, but was an elemental part of the greater offence charged. The accused must be placed on trial for the highest charge contained in the indictment. Where the accusation includes an offence of an inferior degree, the jury may discharge the defendant of the higher offence, and convict him of the less atrocious crime. This rule applies in all cases where the minor offence is necessarily an elemental part of the greater, and where proof of the greater necessarily establishes the minor. Section 72 of the criminal code, 2 G. & H. 405; *Ex Parte Bradley, supra*; *State v. Butman*, 42 N. H. 490; *The State v. Dumphey*, 4 Minn. 438; *The Commonwealth v. Cooper*, 15 Mass. 187; *The State v. Shepard*, 7 Conn. 54; *Prindeville v. The People*, 42 Ill. 217.

The action of the court in placing the appellant upon trial for an assault and battery was irregular and erroneous, and the judgment rendered thereon cannot be sustained. The court, in requiring an election to be made, proceeded upon the theory that the indictment contained an express and substantive charge of an assault and battery. When the State elected to place the appellant on trial upon the charge of

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rape, it was equivalent to saying that she would try him not only for the rape, but for the lesser offence embraced in such charge. If the election of the prosecutor could be construed to extend to the charge of an assault and battery, which was incident to, and embraced within, the higher crime, it would, in legal effect, have amounted to an abandonment of the charge of rape itself; for if the State could not prove an assault and battery, she could not prove a rape. The action of the State should not be extended beyond what was intended, and that was to abandon the express and substantive charge of an assault and battery.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to place the appellant upon trial for the charge of rape. The clerk will immediately certify this opinion.

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LINES v. BENNER.

**PRACTICE.**—*Docketing of Causes.*—Where a cause had been docketed by the clerk for a certain day of the term, and it was called for trial on an earlier day, the plaintiff not being ready for trial on that day, having caused his witnesses to be subpoenaed for the day to which the cause was set on the docket, it was error to thereupon dismiss the action over the plaintiff's objection; and it was not necessary, in order to present such ruling to the Supreme Court, that any opportunity should be offered to the lower court, by motion or otherwise, to review or reconsider its action.

From the Grant Circuit Court.

*A. Steele* and *R. T. St. John*, for appellant.

*R. W. Baily* and *VanDevanter & McDowell*, for appellee.

**DOWNEY, J.**—This cause was set on the docket of the circuit court for the sixth day of the term by the clerk, and the plaintiff had caused his witnesses to be summoned for

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that day. The defendant had, for some reason not shown, summoned his witnesses for the fifth day of the term. In calling the docket for the trial of causes, on the fifth day of the term, the court called this cause, and, the plaintiff not being ready to proceed with the trial, the court, over his objection, dismissed the action. Proper exception was taken to the ruling, and it is assigned as error.

Counsel for the appellee think the question is not properly presented, because there was no opportunity offered to the court, by motion or otherwise, to review or reconsider its action. We think no such motion, etc., was necessary. No motion for a new trial was necessary. There was no trial. No motion to set aside a default was necessary. There was no default. The question is properly presented. The ruling of the court can not be sustained. 2 G. & H. 216, secs. 359, 360; *Norris v. Dodge's Adm'r*, 23 Ind. 190.

The judgment is reversed, with costs, and the cause remanded, with instructions to set aside the order dismissing the action.

#### ON PETITION FOR A REHEARING.

DOWNEY, J.—In a petition for a rehearing, counsel for appellee refer us to the act of March 7th, 1873, Acts 1873, 103. Counsel did not refer to this act, or rely upon it in the original brief. It was referred to, however, by counsel for appellant, and was considered by the court. We did not think, and do not now think, it can be so construed as to justify the action of the circuit court. It gives the circuit judges of the State power, and makes it their duty, by proper order, to arrange and regulate the order of business in their respective circuits, and declares that, in making such order, they shall provide:

1. For the making up of issues and transaction of probate business.

2. For the trial of criminal cases.

3. For the trial of civil cases.

The petition is overruled.

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### THE STATE v. JOHNSON, ADMINISTRATOR.

**PARTIES.—Pleading.—Surplusage.**—Where a cause of action exists in favor of the State, and the action is brought in the name of the State for a certain specified use, the words designating such use will be considered as surplusage, and the action will be regarded as an action brought by the State.

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**CONTRACT.—Public Policy.—House of Refuge.**—A written promise to pay to the State of Indiana a certain sum of money upon the condition that the empowered authorities of the State should locate at Plainfield, in said State, the reform school for juvenile offenders, the authority to locate said school being vested in the Governor and certain commissioners, who had no personal interest in the matter, and who complied with said condition, was not against public policy; and though by the act of March 8th, 1867 (Acts 1867, p. 137), "to establish a house of refuge," etc., no authority to receive such donations of money was expressly given or denied, yet the act of 1855, 2 G. & H. 660, expressly authorizing such donations for such purpose, was not in this respect repealed by said act of 1867.

From the Hendricks Common Pleas.

*J. C. Denny*, Attorney General, and *L. Ritter*, for the State.

*J. V. Hadley* and *J. S. Ogden*, for appellee.

**BUSKIRK, J.**—This was an action by the appellant against the appellee, as administrator of the estate of Jesse Faulkner, deceased, upon a written agreement executed by the decedent, in his lifetime, whereby he agreed to pay the State of Indiana the sum of three hundred dollars, upon the condition that the authorized authorities of the State should locate, at or near Plainfield, Hendricks county, Indiana, the reform school for juvenile offenders. The complaint avers a performance of the condition.

There was a trial of the issue formed, and a finding for the defendant, upon the ground that it was not sufficiently shown by the evidence that the decedent had executed the instrument sued upon. A new trial was awarded, and upon another trial there was a finding for the plaintiff below and appellant here.

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A motion in arrest of judgment was made, based upon the following grounds:

1. Because the plaintiff had not legal capacity to sue in this action, for the reason that there is no law authorizing the State of Indiana to institute a suit for the house of refuge.

2. Because the complaint does not contain facts sufficient to constitute a cause of action against the defendant.

3. Because there is no law authorizing the State of Indiana to receive donations of money to aid in the construction of the house of refuge.

The motion was sustained, and the judgment arrested, from which judgment the plaintiff appeals, and assigns for error the action of the court in arresting judgment.

Waiving the question whether a motion in arrest of judgment presents any question as to the legal capacity of the plaintiff to maintain the action, we are of opinion that the objection is not well founded. By the agreement, which is the foundation of the action, the decedent agreed to pay the sum named directly to the State of Indiana, and in such case the action should have been brought in the name of the State, without any averment as for whose use it was brought. *Shane v. Francis*, 30 Ind. 92. The action being brought in the name of the State, we shall regard as surplusage all that is said about its being brought for the use of the house of refuge.

The conclusion reached disposes of the second cause assigned for the arrest of judgment.

The third reason urged in arrest of judgment presents for decision a very difficult and important question, and that is, whether the Governor and commissioners, in the absence of express legislative authority, were authorized to receive donations in money, on the condition that the house of refuge for the correction and reformation of juvenile offenders was located at or near Plainfield, in the county of Hendricks and State of Indiana.

By the third section of "an act to establish a house of refuge for the correction and reformation of juvenile offend-

ers" (approved March 8th, 1867), the Governor is authorized to purchase or receive donations of real estate for the site of such house. See Acts 1867, p. 137.

By the twenty-fifth section of said act the sum of fifty thousand dollars is appropriated out of the State treasury for carrying out the provisions of said act.

By the twenty-sixth section of such act the Governor and the commissioners created thereby are authorized to sell certain described real estate belonging to the State, the proceeds whereof are to be applied to the purchase of other grounds and the erection of suitable buildings for such institution.

In no part of the act is there any authority given to the Governor and commissioners to receive donations in money to aid in the purchase of a site, or the erection of buildings, or to influence the location of such institution.

It is earnestly contended by counsel for appellee that the agreement of the decedent is against public policy, and therefore illegal, and constitutes no consideration to support the promise.

Story, in his work on contracts, in sections 674 and 675, says:

"Sec. 674. We now come to the third class of illegal contracts, namely, contracts which violate the rules of public policy. The rule of law, applicable to this class of cases, is, that all agreements which contravene the public policy are void, whether they be in violation of law or of morals, or tend to interfere with those artificial rules which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective objects flowing indirectly from some positive legal injunction or prohibition.

"Sec. 675. Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that

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wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy."

Inasmuch as public policy is in its nature uncertain, and as its limits have not been defined with exactness, we find it necessary to examine the adjudged cases, with the view of ascertaining what contracts have, and what have not, been held to be against public policy.

1. It is settled that a contract to procure the passage of an act of the legislature by any sinister means, or by using personal influence with the members, is void, as being inconsistent with public policy and the integrity of our political institutions. *Marshall v. Baltimore and Ohio Railroad Co.*, 16 How. 314; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Harris v. Roof's Executors*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361.

In the case of *Marshall v. Baltimore and Ohio Railroad Co.*, *supra*, the court say:

"It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the State that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently, the law will not enforce a contract to pay money for soliciting peti-

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tions or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

“All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in the courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent ‘stimulated to active partisanship by the strong lure of high profit.’ Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

“Legislators should act with a single eye to the true interest of the whole people, and the courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

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“Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are ‘proper means;’ and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or ‘careless’ members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—‘*Omne Romæ Venale.*’”

In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, the court say :

“The whole reasoning of the court, however, goes to establish these propositions, which cannot be reasonably denied. That the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil or political institutions of a State. That a contract to procure or endeavor to procure the passage of an act of the legislature, by any sinister means, or even by using personal influence with the members, would be void, as being inconsistent with public policy and the integrity of our political institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive

to the exercise of personal and sinister influences to effect the object. These are broad fundamental principles, to the truth of which we subscribe, and which cover the whole ground on which this case rests. It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

2. An agreement for compensation for procuring a contract from the government to furnish its supplies is against public policy, and cannot be enforced by the courts. *Tool Company v. Norris*, 2 Wal. 45.

In the above case the court say:

"The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and

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thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

“The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

“There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements.

“The same principle has also been applied, in numerous instances, to agreements for compensation to procure appointments to public offices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to

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introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.

“Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.”

3. Railway companies are *quasi* public corporations, and the directors act as agents of the company, and also as trustees of the public, clothed with an important public trust, and any agreement to pay to such directors, or other agents, any sum of money, or to deed real estate upon the condition that the line of said road be located on a certain route, or that a depot be located at a certain place, is against public policy and void. *Fuller v. Dame*, 18 Pick. 472; *The Pacific Railroad Co. v. Seely*, 45 Mo. 212; *Holladay v. Patterson*, in the Supreme Court of Oregon, published in 2 Cent. Law Journal, 63.

4. All agreements by which one person engages to pay another for his aid or influence in procuring an appointment to office are illegal and void. *Gray v. Hook*, 4 N. Y. 449, and cases there cited.

5. A contract founded upon a promise and engagement to procure signatures and obtain a pardon from the Governor for one convicted of a criminal offence and sentenced to punishment is unlawful and can not be enforced by an action. *Hatzfield v. Gulden*, 7 Watts, 152.

6. It is settled that any arrangement or combination

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among the parties applying for a street improvement, whereby a few individuals, desirous of causing the grading and paving to be done, procure the signatures of others to the application by paying them a consideration therefor, either directly or indirectly, is a fraud in law and contrary to public policy. *Maguire v. Smock*, 42 Ind. 1; *Howard v. The First Independent Church of Baltimore*, 18 Md. 451.

7. An agreement based upon a confederation or combination of persons for the purpose of preventing competition at an auction sale and of depressing the price of property below its fair market value is against public policy and void. Story on Con., sec. 677, and authorities cited.

8. An agreement in general or total restraint of trade is void, though it be founded on a legal and valuable consideration; but an agreement in partial restraint of trade, restricting it within reasonable limits as to time and place, is valid. Story on Con., sections 679 to 686, and the numerous cases cited.

9. Contracts in restraint of marriage are void upon grounds of public policy, and so are conditions in wills in restraint of marriage. Story on Con., sections 687 to 693.

10. Marriage brokerage contracts, by which are meant contracts or agreements to negotiate a marriage between two parties, for a compensation, are utterly void, and incapable of confirmation. Story on Con., sec. 694.

11. A wager on a subject which is illegal, or which offends against public policy, is void. Story on Con., secs. 695, 697, and authorities.

12. Contracts to do acts which are indictable or punishable criminally, or to conceal and compound such acts, or to suppress evidence in a criminal prosecution, are void. Story on Con., sec. 700, *et seq.*

13. An agreement with a public officer to compensate him for doing an act which it is his legal duty to do without compensation is void, because every officer is bound to do his duty conformably to law. Story on Con., sec. 703.

14. All contracts to indemnify officers against prospective non-feasance, malfeasance, or misfeasance of their official duties are void, but a promise to indemnify an officer for the execution of an act apparently legal is good. Story on Con., secs. 704, 709.

15. Contracts for the sale of public offices are in violation of public duty and void. Story on Con., sec. 709.

16. Contracts for the maintenance of suits, or for champerty, or embracery, or bribery or extortion are void. Story on Con., secs. 710, 716.

In Illinois, where one subscribed to a paper promising to pay to the county commissioners a sum for the purpose of defraying in part the expenses of a court-house, provided it should be located and erected on a certain described lot, and the house was erected on that lot, it was decided by the Supreme Court of that State that the commissioners could not maintain an action on that promise, because, among other reasons, it was a promise to pay them for an act which they were required by law to do, and was therefore void as being against public policy. *County Commissioners of Randolph County v. Jones*, Breese, 237.

17. But in *Carpenter v. Mather*, 3 Scam. 374, it was held that where a statute fixed the seat of government at Springfield, upon the condition that the inhabitants of said town should subscribe a certain sum of money towards erecting the State House, and executed their bonds for the payment of the same, a bond given under such statute was founded upon a sufficient consideration, and was valid. The opinion was rendered by DOUGLASS, J., and was based upon the authority of the case next cited.

18. In *State Treasurer v. Cross*, 9 Vt. 289, it was held that a subscription by which the subscribers individually promise to pay the Treasurer of State the sums annexed to their names towards building a State House, is not void for want of consideration, or as against public policy. The court say:

“The propriety of any particular location of public

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buildings may depend, in some measure, upon the sum proposed to be given by the citizens of any place. The public interest obviously requires that such location should be made with a view to all the circumstances, and the greater or less burthen to the whole State would be an important circumstance to be taken into consideration, in determining between several places, in other respects equally convenient. The increased value of the property, in the vicinity of public buildings, would seem to require that those, who are benefited, should contribute some part of the increase, for the purpose of erecting them, rather than that the whole advantage should accrue to them, and the expense be wholly borne by the citizens generally. We can see no foundation for the objection made to this subscription, on the ground of public policy or propriety."

19. In *Bull v. Talcot*, 2 Root, Conn. 119, it was held that a recovery could be had on a subscription whereby the subscribers agreed to pay certain sums on the condition that a court-house was erected upon a certain lot which was described.

20. In *Commissioners of the Canal Fund v. Perry*, 5 Ohio, 56, it was held that undertakings by written subscription to contribute money or other property in aid of public works are valid contracts that may be enforced in courts of justice. The court say:

"It has been repeatedly decided in this State, and elsewhere, that promises to pay money for the erection of school and court-houses, churches and bridges, would, the work being undertaken or done, sustain the action of assumpsit. A moral obligation is sufficient to support an action on an express promise. \* \* \*

"The subscription we are now called to examine does not rest alone upon the general principle, but may invoke to its aid a positive enactment of the legislature. \* \* \* \*

"The contract here is not against good policy or good morals, nor against law, but in conformity with its express provisions."

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21. In *Caldwell v. Harrison*, 11 Ala. 755, it was held that an action could be maintained upon a subscription whereby the signers agreed to pay certain sums upon the condition that a certain bridge should be erected within a limited time according to a plan to be agreed upon by certain public commissioners, a performance being shown.

22. That an agreement to give money for the erection of colleges, churches, school-houses, and other charitable purposes, on conditions, is valid, we cite the following cases:

*University of Vermont v. Buell*, 2 Vt. 48; *Religious Society v. Stone*, 7 Johns. 112; *M'Auley v. Billenger*, 20 Johns. 89; *Collier v. Baptist Education Society*, 8 B. Mon. 68; *The Trustees of Amherst Academy v. Cows*, 6 Pick. 427; *The Trustees, etc., v. Davis*, 11 Mass. 113; *Williams College v. Danforth*, 12 Pick. 541.

In the case last cited, the subscription was made upon the express condition that the college should remain at Williams-town where it was then located.

23. In *George v. Harris*, 4 N. H. 533, the action was based upon a subscription which declared, that "for the purpose of providing a suitable court-house in the town of Plymouth, and to have said town continue a half shire, we," etc., "promise to pay," etc., on the condition that some person would give a half acre of land for a site; and it was held that the subscribers were liable to pay their subscriptions.

24. The case of *Odineal v. Barry*, 24 Miss. 1, has an important bearing upon the question under examination. The facts are substantially these, as they appear in the opinion of the court: The court-house in Lowndes county had become old and dilapidated, and the board of police had determined to build a new one. Certain citizens of Columbus petitioned the board to build the new court-house on a different lot in a different part of the town of Columbus from that on which the old one was situated, and the board was inclined to accept the proposition, and to change the

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location. Craven and Wade and certain persons owning property near the old court-house, which would have been diminished in value by the removal of it to another part of the town, proposed to pay the county two thousand dollars towards the erection of the new building, if the board of police would build it on the site of the old court-house. This proposition the board accepted, and did build it on the same lot. The note sued on was given in consideration of this action of the board, and in part performance of the contract to pay them therefor. It is also admitted that the property of the defendants would have been diminished in value, if the court-house had not been so erected and had been built on the other lot to which it was proposed to remove it. The court say:

“This brings us to the consideration of the last point, which we deem it necessary to notice in this opinion. Was the consideration on which this promissory note was given illegal? We do not think so. We recognize fully the doctrine of this court in the case of *Merrell v. Legrand*, 1 How. Miss. 150, that the consideration of a contract must not be merely of benefit to one party, or prejudice to the other; but that the benefit or prejudice must arise from a legal, and not an illegal or immoral act. No contract will be enforced in a court of justice which is founded on an illegal or immoral consideration, or which is contrary to public policy. In this case, it is not pretended that there was any express law prohibiting the board of police from making this contract, or that it was a contract immoral in itself; but it is said it was a contract against public policy, and, therefore, should not be enforced. What principle of public policy does it violate? The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants to pay them so much as individuals, in consideration that they would not change the site of the court-house. If it had been, it would have been clearly ille-

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gal, and could not have been enforced. But the contract was made by them in their official capacity, for the benefit of the county. When collected, the money will become the property of the county, and be under its direction and control, applicable to any purpose that may be deemed beneficial, or promotive of its interests."

In *Clark v. Polk County*, 19 Iowa, 248, the court say:

"While public policy should not be made to override principle, nor yet to overturn or run counter to an unbroken current of authorities, it may nevertheless be properly considered by judicial tribunals in determining a question whereon the authorities are in conflict, or the principle on which it rests is more or less uncertain. Or, as in this case, it may be considered in fortifying the authorities, and the more unerringly to fix the principle on which the case rests."

In *Richmond v. Dubuque, etc., R. R. Co.*, 26 Iowa, 191, the court say:

"But further than this, the power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

After mature and thoughtful consideration, we have arrived at the conclusion that the contract sued upon is not against sound public policy. The Governor was not prohibited from receiving donations in money. He was invested with a discretion. His duty required him to exercise his best judgment in making a location of a public institution. It was proper for him, in determining the location, to take into consideration any aid which might be offered by any particular locality. The sum donated lessened the public burden and placed it on those who would receive a personal advantage by such location. The money donated went into the fund provided for the erection of suitable buildings. The Governor received no part of the money, and had no personal interest in the matter. He acted for the public good only. Then, how could his judgment be perverted by the

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giving of money which was used to carry out a charitable purpose? There is no pretence that there was any favoritism or partiality on the part of the Governor or the commissioners who aided him by their counsel. Nor is it claimed that a bad location was made. In the case of railroads and other *quasi* public corporations, the directors are stockholders and have a personal and pecuniary interest in all donations made. Under these circumstances, they might, in consulting their own interest, lose sight of the public good. In the case in judgment, the Governor was not subjected to any such temptation.

But we are not required to rest our judgment in the present case solely upon the general doctrine of public policy.

It is provided by section 2 of article 9 of our state constitution, that "the General Assembly shall provide houses of refuge for the correction and reformation of juvenile offenders." In compliance with the above imperative requirement, the legislature, on the 3d day of March, 1855, passed an act for the erection of a house of refuge. The Governor, Treasurer of State, and Superintendent of Public Instruction were authorized and directed to purchase not exceeding forty acres of ground for the site of such institution, and, in making the selection, regard was to be had to the center of population, cheapness of living, and facility of access.

The second section of said act provides: "The said officers of State may also take into consideration any proposed donation of land, and any proposed donation of money or materials, towards the erection of such buildings, from any county, or from the citizens of any county, but shall not be wholly governed by such proposed donations, but shall select that point which will combine economy to the State with the several requisites mentioned in the preceding section; and should said officers of State accept such donations, they shall proceed to secure the same to the State in the manner that may seem most advisable." 2 G. & H. 660.

The above act remains in force, except in so far as the same was modified or repealed by the act of 1867. The

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purpose of the act was defeated by the smallness of the appropriation made. It relates to the same subject and has the same object as the act of 1867. The two acts are to be construed together, and effect is to be given to both, if possible. In placing a construction upon the latter, reference is to be had to the former act. Buskirk's Pr. 358, and authorities cited; *Prather v. The J., M. & I. R. R. Co.*, ante, p. 32.

We are of opinion that, instead of the contract sued upon being against law and the public policy of the State, it is in strict conformity to both.

It necessarily results that the court erred in arresting judgment.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the motion in arrest, and to render judgment on the finding, computing interest thereon from the time it was rendered to the rendition of judgment.

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STILSON v. THE BOARD OF COMMISSIONERS OF LAW-  
RENCE COUNTY.

CONTRACT.—*Public Policy.*—*Removal of Court-House.*—A written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had removed the county court-house from the public square and were building a new court-house elsewhere, would remove it back to said square, which offer was accepted by said commissioners, who entered on their records an order for such relocation, was not void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations.

From the Lawrence Circuit Court.

*F. Wilson, A. C. Voris, A. B. Carlton, A. D. Lemon, N. Crook, J. E. McDonald* and *J. M. Butler*, for appellant.

*E. D. Pearson*, for appellee.

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BUSKIRK, J.—The assignments of error present but one question, and that is, whether the contract sued upon is void by reason of being against public policy.

The material facts set forth in the pleadings and proved upon the trial are, that the county commissioners had commenced the erection of a new court-house upon lots Nos. 27 and 28, in the town of Bedford, the site having been changed from the public square, where the old court-house stood, to said lots; that the commissioners had already purchased said lots for that purpose, had contracted for the building thereon of said new court-house, and that the foundation thereof had been put in; also, that suits had been brought against said board, endeavoring to enjoin the building of said new court-house upon said new location, which suits said commissioners had been compelled to resist, in doing all of which it is averred that said commissioners had incurred considerable expense; and that theretofore, to wit, on the 19th day of April, 1870, and when said commissioners were in session, the appellant and twenty-seven others petitioned said commissioners to remove said new court-house site back to the public square, from whence it had been removed; and in consideration of the personal advantage they supposed said new court-house would be to them if built upon the public square, and in consideration of their several promises to each other and the expenditure by said commissioners, incurred as aforesaid, and the additional expenditure that would have to be incurred in changing said location back to said public square, they promised in writing to pay into the treasury of said county the sums respectively attached to their names; and that, on the offer and solicitation of said petitioners and others, they accepted said proposals and entered upon their record an order for such relocation.

The question arising in the record was fully considered, and decided adversely to the appellant, in the case of *The State v. Johnson*, at the present term, *ante*, p. 197. Upon the authority of that case, the judgment in the present case must be affirmed. The two cases differ in this, that in the

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above cited case there was a statute which authorized the reception of donations in money or materials, while in the present case there is no such legislative sanction. But the ruling in the present case is predicated upon the general principles of law relating to public policy, as laid down in the above cited case.

The judgment is affirmed, with costs.

PETTIT, J., dissents from the conclusion reached by a majority of the court.

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MANLY v. THE STATE.

CRIMINAL LAW.—*Change of Venue*.—Where, in a criminal action, an application is made by the defendant for a change of venue on account of alleged bias and prejudice of the judge, the court has no discretion, if the affidavit be sufficient, but must grant the change.

From the Floyd Criminal Circuit Court.

*J. S. Davis* and *D. C. Anthony*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

DOWNEY, J.—The appellant was convicted on an indictment, charging that he did, at, etc., on, etc., in and upon the body of one Hugh Canigg, unlawfully make an assault, and him, the said Hugh Canigg, he, the said Charles Manly, did then and there unlawfully, feloniously, purposely and maliciously touch, strike, beat and wound, then and there injuring, bruising and wounding him, the said Hugh Canigg, so that the said Hugh Canigg of said wounds, bruises and injuries, so inflicted, died; and so the grand jurors aforesaid, etc., present that the said Charles Manly, at, etc., on, etc., did unlawfully, feloniously, purposely and maliciously kill and murder the said Hugh Canigg, contrary to the form of the statute, etc.

Upon arraignment, the defendant demanded a change of

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venue, on account of the alleged bias and prejudice of the judge. The change was refused.

The affidavit is sufficient. The learned judge states, in the bill of exceptions, as reasons why the change of venue was refused, that the practice of making such motions had become so frequent that the court, in the discharge of its duty, was seriously interrupted; that the court did not know the defendant, and if the practice should continue, it would become difficult for the court to preserve its self-respect or to discharge its duty.

We think that, notwithstanding these reasons, the court should have granted the change. When the objection is on account of the alleged prejudice of the judge, the court has no discretion in case the affidavit is sufficient. 2 G. & H. 406, secs. 76 and 77; *Mershon v. The State*, 44 Ind. 598, and cases there cited.

Other errors are alleged, occurring during the trial, but we do not deem it necessary to examine them.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for the change of venue asked by the defendant.

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ROBB v. THE STATE.

CRIMINAL LAW.—*Horse-Racing.—Evidence.*—An indictment charged the defendant with suffering his horse to be run in a horse-race; the evidence showed that the defendant rode in a race a horse which was owned by another person.

*Held*, that the evidence was insufficient.

From the Gibson Circuit Court.

*R. M. J. Miller*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

DOWNEY, J.—The appellant was indicted for suffering his horse to be run in a horse-race along a public highway, and

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Robb v. The State.

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on plea of not guilty and trial by the court, was found guilty ; a new trial was refused, and there was final judgment against him.

The refusal to grant a new trial is the error alleged, and the question made is as to the sufficiency of the evidence. The facts were agreed upon and are as follows:

“It is agreed, by and between the parties hereto, that the evidence in the above entitled cause is to the effect that the said defendant on the 1st day of August, 1875, at the county of Gibson, was running a horse which he was riding in a horse-race with one Moses Robb, Jr., on a public highway in said county leading from Princeton, in said county, to Petersburg, in Pike county, and that said defendant was heard to say that he would not have a horse that could not beat a two-year old.

“It is further agreed that the horse rode by the defendant at the time was not his horse, but was the horse of his father, which he had procured that morning and was riding that day ; that said defendant is a minor ; and that he ran said horse without the father’s knowledge or consent. And it is hereby agreed to submit this cause to the court for trial upon the above agreed statement of facts.”

The statute on which the indictment is founded reads as follows:

“Any person who shall knowingly suffer his horse to be run in a ‘horse-race’ along any public highway in this State, and any person who shall act as rider in any such race, on being convicted shall be fined,” etc. 2 G. & H. 467, sec. 31.

For the owner of a horse to knowingly suffer his horse to be run in a horse-race is one offence under this section. For any person to act as rider in such a race is another and different offence. It is probable that the legislature, in the last branch of the section, had reference to the case where the rider was not the owner of the horse ridden by him. It is not necessary for us to say under which branch of the section the indictment should be drawn, when the owner not only suffers his horse to be run in the race but also acts as

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rider of his own horse. Perhaps he might be indicted under either, but would be liable to only one punishment for both concurrent acts.

In *The State v. Ness*, 1 Ind. 64, it was said: "It is an offence for a person to permit his horse to be run in a horse-race. It is a separate offence for a person to act as a rider in a race." In the case under consideration, the defendant was charged with suffering his horse to be run in a horse-race. The evidence shows that the defendant did not own the horse, but rode the horse of another person. We think the evidence did not prove the offence charged.

The judgment is reversed, and the cause remanded for a new trial.

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ROBB v. THE STATE.

From the Gibson Circuit Court.

*R. M. J. Miller*, for appellant.

*C. A. Buskirk*, Attorney General, and *J. C. Schafer*, Prosecuting Attorney, for the State.

BIDDLE, C. J.—This case is in all respects the same as *Robb v. The State*, decided at the present term, *ante*, p. 216. Judgment reversed; cause remanded, etc.

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NOFSINGER v. REYNOLDS ET AL.

PRACTICE.—*Action to Compel Foreclosure of Mortgage.—Jurisdiction.—Interpleader.—Process.*—A., the owner in fee simple of certain real estate, on which there were two mortgages, one executed by A. to B., a former owner, and a prior one executed by B. to C., who was B.'s vendor, brought an action in the county wherein said real estate was situated, against B. and C., to compel the defendants to interplead and litigate matters in dispute between them in regard to said prior mortgage, and to cause satisfaction of said mortgages to be entered.

52b	218
138	505
52	218
Case 2	
162	387

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*Held*, that the court was not deprived of jurisdiction of C. because he resided in another county.

*Held*, also, that the complaint in such action was not bad on demurrer because there was no affidavit attached thereto denying collusion of the plaintiff with either of the defendants.

*Held*, also, that the defendants having been brought into court to interplead, no further process was necessary against C. upon the filing of a cross complaint by B.

**BILL OF EXCEPTIONS.—*Time of Filing.***—Preceding a bill of exceptions in the transcript of the record on appeal was the following: “Nofsinger’s bill of Ex., No. 7, filed Nov. 13th, 1871.”

*Held*, said date being within the time allowed for the filing, that it was sufficiently shown that the bill was filed, and that it was filed in time.

**MOTION FOR NEW TRIAL.—*Instructions to Jury.—Bill of Exceptions.***—A cause assigned in a motion for a new trial was, “error in refusing to give to the jury instructions numbered one to eleven inclusive, asked by the defendant, as shown by his bill of exceptions.” The bill of exceptions was not yet filed.

*Held*, that the cause assigned was sufficiently definite, without the aid of the bill of exceptions.

**EXCEPTIONS.—*Instructions to Jury.***—In a bill of exceptions, following certain instructions to the jury given by the court were certain instructions signed by counsel, immediately preceded by a statement that they were asked by the defendant and refused by the court, after which instructions refused was the following: “To the giving of each of which instructions and the refusal to give those asked, defendant at the time objected and excepted.”

*Held*, that the exception was not too general or indefinite, but was properly taken.

From the Montgomery Circuit Court.

*B. Harrison, C. C. Hines and W. H. H. Miller*, for appellant.

*J. P. Baird, O. Cruft, J. E. McDonald and D. W. Voorhees*, for appellees.

**DOWNEY, J.**—This action was commenced in the Vigo Circuit Court and by change of venue taken to the Montgomery Circuit Court. It was brought by David C. Stunkard against the appellant, Nofsinger, and Harris Reynolds.

The complaint alleges, in substance, that the plaintiff is the owner in fee simple of the property known as the Buntin House, being lot 99 and part of lot 58 in Terre Haute; that in November, 1865, said property was owned by Nofsinger,

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*Nofsinger v. Reynolds et al.*

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who then sold and conveyed the same to Reynolds, who paid him part of the price and executed to him his notes and a mortgage on the property for ten thousand dollars, the balance of the purchase-money; a copy of the mortgage is filed and made a part of the complaint; that in April, 1866, Reynolds sold and conveyed the undivided half of the premises to one Robbins, the said Reynolds agreeing to discharge said mortgage; that afterwards said Robbins conveyed to one Adamson, and Adamson to the plaintiff, the said mortgage still being of record against said property; that in the year 1866, said Reynolds sold and conveyed to one Wingate the other undivided half of said property; that Wingate gave his note to Reynolds as a part of the purchase-money for one-half of the amount of said mortgage and interest, and Reynolds agreed to discharge said mortgage to Nofsinger and have the same satisfied on the records.

It is further alleged that in December, 1868, Wingate sold and conveyed said property to the plaintiff, and it was agreed that the plaintiff should execute to Reynolds his note for five thousand five hundred and eighty-four dollars and fifty cents, with interest, secured by a mortgage on said property, and Reynolds released all claims on Wingate and gave to plaintiff his obligation, to the effect that he would have said mortgage satisfied on the record. A copy of this note, mortgage and agreement is also filed and made part of the complaint. It is averred that Reynolds was to have said mortgage satisfied in a reasonable time, and that he has failed, and now refuses so to do; that the plaintiff desired to pay the amount of his note to Nofsinger on his mortgage, but Reynolds refused to allow him to do so; that Reynolds insists that his mortgage to Nofsinger is without consideration, that the consideration has failed, and that he has a counter-claim against the same which will exceed the amount of the said mortgage, with which he proposes to satisfy the same; that plaintiff is unable to sell said property, owing to the title being clouded by said incumbrance; that

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Nofsinger v. Reynolds *et al.*

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neither Nofsinger nor Reynolds will bring any suit, or in any way adjust the matters between them.

It is further stated that there is a large brick hotel on said lots, which requires a large sum to be expended on it in improvements, and it is not safe to make such improvements until these incumbrances are removed.

The plaintiff offers to bring into court the amount apparently due on said notes and mortgage from Reynolds to Nofsinger, to wit, fourteen thousand three hundred and seventy-five dollars, and asks that Reynolds and Nofsinger be required to interplead and litigate the question as to whether said mortgage from Reynolds to Nofsinger is a valid lien on said real estate for the full amount or any part thereof, and that the court on the hearing will determine how much, if anything, is due on said notes and mortgage from Reynolds to Nofsinger, and will apply the money so brought into court to the payment and satisfaction of such amount as is found to be due to said Nofsinger, for that purpose decreeing the amount due from plaintiff to Reynolds to the payment thereof, and then decree that the money so applied shall also operate as a satisfaction of the debt and mortgage from plaintiff to Reynolds, and if a sum greater than what is due from plaintiff to Reynolds is found to be due from Reynolds to Nofsinger, plaintiff asks for a judgment personally against said Reynolds for such excess, with interest from this date; that both of said mortgages be satisfied, and that Reynolds and Nofsinger be required to enter satisfaction of their respective mortgages on the proper records, and that Reynolds surrender his note against the plaintiff; that the court will quiet the plaintiff's title to said real estate by removing said clouds, and grant such other and proper relief as may be just and equitable.

Nofsinger, while the case was yet pending in Vigo county, filed an answer, alleging that the court had no jurisdiction over his person, because at the commencement of the action, etc., the said defendant was a resident of Marion, and not of Vigo county, and that his co-defendant, Reynolds, was a res-

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ident of the county of Montgomery, and not of the county of Vigo.

This answer was held bad on demurrer thereto. Nofsinger answered the complaint, setting up his notes and mortgage against Reynolds, etc. A demurrer of Stunkard to the second paragraph of the answer in bar of the appellant was sustained.

Reynolds filed a cross complaint against Stunkard and Nofsinger, alleging in different paragraphs payment of his notes and mortgage to Nofsinger, failure of consideration, etc.

Nofsinger answered the cross complaint, again urging the want of jurisdiction of his person, but this answer was also held bad. He also answered in bar of the cross complaint.

Nofsinger also filed a cross complaint against Stunkard and Reynolds, to which there was an answer. The issues were tried by a jury, and there was a general verdict for Nofsinger for six hundred and forty-seven dollars and thirty-five cents, and also answers to certain interrogatories. A motion for a new trial was made by Nofsinger and overruled, and there was final judgment.

Thirteen errors are alleged, but only part of them are urged. It is urged, in the first place, that the court had no jurisdiction of the person of the appellant; that the action was not properly brought in Vigo county; and that the court therefore erred in sustaining the demurrer to the answer of Nofsinger to the jurisdiction.

Secondly. It is insisted that the court improperly sustained the demurrer of Reynolds to the answer in abatement of the appellant to the cross complaint of Reynolds.

Thirdly. That the court, on the demurrer of Stunkard to the second paragraph of the answer in bar of the appellant to the complaint of Stunkard, should have held the complaint insufficient.

Fourthly. That process should have been issued on the cross complaint of Reynolds against Nofsinger, which was not done, but he was compelled to answer without process.

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And lastly, that the court, in several particulars, misdirected the jury in the instructions.

On the first question, that is, as to the jurisdiction of the Vigo Circuit Court, we have with some hesitation arrived at the conclusion that no error was committed. The ground on which our ruling is put is this: the object of the action was to compel the appellant to institute an action to foreclose his mortgage on the real estate, which was situated in Vigo county. If the court should sustain the complaint, it would have been proper for the court to have adjudged and ordered that Nofsinger should file a complaint to foreclose his mortgage, to which he would have made Reynolds and Stunkard defendants. Reynolds might then have pleaded his defences to the complaint, and thus the controversy might have been settled, and the proper judgment rendered. This course was not pursued, however, but two cross complaints and much pleading in addition are found in the record. If this view of this point in the case is not correct, it must be because the action by Stunkard to compel an interpleader might have been commenced in Marion county, where Nofsinger resided, or in Montgomery county, where Reynolds resided; and then, when an interpleader was ordered, Nofsinger must have gone to Vigo county to institute his action to foreclose his mortgage; for there can be no doubt but that the suit to foreclose the mortgage must be brought in that county. 2 G. & H. 56, sec. 28. Of the correctness of this latter mode of proceeding we have no more doubt than we have of the correctness of the manner resorted to in this case. We will not say that either course might not be adopted. But that the latter mode may be used we need not in this case decide. It is said in Willard's Equity, p. 321:

“If the plaintiff's right to file the bill be contested by either of the defendants, the issues must be tried as in other cases.”

Again, on p. 322, he says:

“If, at the hearing, the question between the defendants

is ripe for a decision, the court decides it; and if it is not ripe for decision, directs an action, or an issue, or a reference to a master, as may best suit the nature of the case."

The provisions of our civil code are broad enough to warrant such judgment as may be necessary. 2 G. & H. 218, sec. 368.

The second error urged involves no other question than that already decided.

Next, it is claimed that the complaint was bad. There was no demurrer to the complaint, and it is not assigned as error that it does not state facts sufficient to constitute a cause of action. There appears to have been a demurrer filed and sustained to the second paragraph of the answer in bar of the appellant to the complaint of Stunkard; but the demurrer is not in the record. We doubt exceedingly whether this point is in the record. It was required, according to the pleading and practice in suits in chancery, that to a bill for interpleader proper there should be an affidavit annexed denying all collusion with either of the parties; and

if this was not done, the bill was demurrable for that reason. Willard Eq. 316; Daniell Ch. Pl. & Pr. 1552.

We do not find that it was necessary in chancery to deny in the bill the existence of collusion, and as a demurrer under the code can be sustained for specified causes only, and as the want of verification of a pleading is not one of them, we conclude that the objection of want of affidavit in such case is not cause of demurrer. *Turner v. Cook*, 36 Ind. 129.

It may be that in a case like this no affidavit is required. See Daniell Ch. Pl. & Pr. 1563, and *Vyryan v. Vyryan*, 30 Beav. 65; S. C., 7 Jur. N. S. 891.

We do not think the fourth objection can be allowed. As the parties were called into court to interplead, it seems to us that no further process was necessary when the matters in dispute were to be settled in the same action. *Pattison v. Vaughan*, 40 Ind. 253.

Before leaving the subject of the pleadings in such a case, we may remark that it seems to us quite clear that the case,

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as made by the complaint, is not properly one of strict interpleader. Various definitions are given of the remedy, all substantially the same. Perhaps the following is correct: It is a complaint filed for the protection of a person, from whom several persons claim, legally or equitably, the same thing, debt or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.

The complaint should allege: 1st. That two or more persons have preferred a claim against the complainant. 2d. That they claim the same thing, debt or duty. 3d. That the complainant has no beneficial interest in the thing claimed. 4th. That he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs. Willard Eq. 314; Story Eq., sec. 801; Daniell Ch. Pl. & Pr. 1560; *Crane v. Burntrager*, 1 Ind. 165.

There are, however, bills in the nature of bills of interpleader, as well as bills of interpleader, properly so called; but wherein they differ and what are the requisites of such bills in the nature of bills of interpleader do not clearly appear.

Story says: "But although a bill of interpleader, strictly so called, lies only where the party applying claims no interest in the subject-matter; yet, there are many cases where a bill, in the nature of a bill of interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons;" and he mentions the following, among other instances: "So, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court, to ascertain their rights, and to have a decree for a redemption, and to make a secure payment to the party entitled to the money." Story Eq., sec. 824. And see *Goodrick v. Shotbolt*, Pre. Ch. 333, and *Bedell v. Hoffman*, 2 Paige, 199.

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It may be remarked, in this connection, that the provision in our civil code on the subject of interpleader, 2 G. & H. 54, sec. 23, has relation to cases where an action is pending, and does not prevent a resort to an action to compel an interpleader. See Willard's Eq. 315.

We are next to examine the instructions.

It is urged by counsel for appellees, that the question as to the instructions depends upon whether the bill of exceptions is properly in the record or not, and they deny that it is properly in the record. Sixty days from September 22d, 1871, were given in which to file the bill, and this statement precedes the bill of exceptions in the record: "Nofsinger's bill of Ex. No. 7, filed November 13th, 1871." We are of the opinion that this sufficiently shows that the bill of exceptions was filed, and that it was filed in time.

It is further insisted that the reason for a new trial relating to the instructions was too indefinite. It was as follows:

"Error in refusing to give to the jury instructions numbered one to eleven inclusive, asked by the defendant, as shown by his bill of exceptions."

It is urged that the reference to the bill of exceptions, which was not then filed, renders the reason for a new trial too uncertain. If the instructions were not identified by their numbers, we should think this position well taken; but we think the ground for a new trial was sufficiently definite without any aid from the bill of exceptions.

Again, it is urged that the exception taken was too general and indefinite. It was as follows:

"To the giving of each of which instructions and the refusal to give those asked, defendant Nofsinger at the time objected and excepted."

This exception follows immediately after the instructions asked by the defendant, and immediately preceding them and following the court's instructions is this statement:

"And the court refused to give the jury the following instructions asked by defendant Nofsinger, to wit:" The

instructions are in the bill of exceptions, and are signed by counsel. We think the exception was properly taken.

Again, it is insisted by counsel for appellees that, although fraud in one form is charged in the cross complaint of Reynolds against Nofsinger, yet the evidence did not present that as a material matter on the trial of the cause, and that therefore the instructions were properly refused. We find that most of the propositions contained in the eleven instructions refused were fully given in the general charge of the court. To this extent the charges asked were properly refused.

The following propositions, being part of the sixth and all of the seventh instruction asked, were refused:

“A mere expression of opinion by Nofsinger as to the value of the property sold would not constitute fraud. If Reynolds was as competent as Nofsinger to judge of the value of the personal property, or call to his aid those who were, and before the sale saw the personal property or so much of it as to enable him to form a reasonably correct judgment of the value, he could not afterwards rely upon any expression of opinion of Nofsinger as to such value, nor would such representation or expressions of opinion constitute fraud.”

In a case to which they were applicable, no doubt these instructions would be proper, for it is the law, as held by this court, that misrepresentations by one contracting party to the other, as to the value or quality of a commodity in market, when correct information on the subject is equally within the power of both parties with equal diligence, do not constitute fraud. But we do not think there was anything in this case, as it was presented to the jury, which rendered it material to give these instructions. The case presented itself as one of contract, rather than as one of tort. The parties had entered into a contract, by which Nofsinger had agreed to give possession of the hotel and the furniture, etc., therein, which he had represented to amount to ten thousand dollars or more, at a certain time, and the evidence

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tended to show that he failed to do this, and that Reynolds really only got personal property to the amount of six hundred and fifty-six dollars and twenty cents. Nofsinger sought to get the written contract reformed, but failed in this, and it seems to us that the case went to the jury and was decided by them on the contract, and not on the ground of any representations of Nofsinger as to the value of the property. It is true that Reynolds, in the fourth paragraph of his cross complaint, charged that Nofsinger had represented that there was a certain amount of property in the hotel; but this seems to us only to have been alleged for the purpose of charging that Nofsinger failed to deliver to him the property which he represented there was in the hotel, and not for the purpose of charging that the representations were untrue and fraudulent.

The fifth instruction asked by Nofsinger was :

“If the jury believe from the evidence the written contract in duplicate was deliberately prepared by said Reynolds, and written by him, and was afterwards presented to said Nofsinger for his signature, who only casually or hastily examined the same before signing, then stronger proof of mutual mistake would be required of said Reynolds, to support his application to reform the agreement, than would be required of said Nofsinger to support his.”

This instruction was refused, and the jury were told that “the question whether more or less evidence is required of one or the other of the parties in this regard, is purely a matter for you” (the jury) “to determine, from your view of all the circumstances and facts proven.”

Reynolds, as well as Nofsinger, alleged that there was a mistake in the written contract, each averring a mistake in a particular different from that alleged by the other. We do not think that there was any error in the action of the court in this ruling. The question whether the contract should be reformed or not did not depend upon which party produced the stronger proof. If there was proof of the mistake alleged by either party, the contract might have been cor-

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rected in that particular, whether such proof was stronger than that produced by the other party to show the mistake alleged by him or not, or whether such other party produced any evidence of the mistake alleged by him. There was nothing practical in the proposed instruction. We have examined the instructions given by the court, and we think the appellant has no substantial ground on which to complain of them.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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THE BALTIMORE, PITTSBURGH AND CHICAGO RAILROAD  
COMPANY v. LANSING.

**PRACTICE.**—*Exclusion of Evidence.*—*Exception.*—Where, upon the trial of an action, an objection to a question propounded to a witness has been sustained, an exception to the ruling cannot be made available on appeal where it is not shown what was the ground of objection, or that the party asking the question stated to the court what facts he proposed or expected to establish by the answer to the question.

**RAILROAD.**—*Appropriation of Land.*—*Damages.*—On the trial of a proceeding to condemn land for the track of a railroad, it was not error to instruct the jury that the land-owner was entitled, as damages, to the value of the land actually taken, to which might be added any injury to the residue of the land naturally resulting from the appropriation and the construction and operation of the road thereon, such as cutting the fields into inconvenient and ill shape, and destroying means of communication between different portions of the farm, the company not being required to furnish any crossing other than highway crossings, but being entitled to exclusive possession of the strip taken; and that the jury might consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already inclosed, as the company was not legally obliged to fence the railway track, except so far as it might choose to do so for the protection of its own interests, the law simply imposing on the company the obligation to pay for animals killed by it on its track where it was not, but might be, securely fenced.

From the Porter Circuit Court.

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138	596
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112	319
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149	179
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156	295
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168	218

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*T. J. Merrifield, W. Johnston and H. Binnamon*, for appellant.

*W. H. Calkins*, for appellee.

BUSKIRK, J.—This was a proceeding under the fifteenth section of the railroad law, 1 G. & H. 509, by the appellant, to condemn land of the appellee for its track. Appraisers were appointed by the judge of the Porter Circuit Court, as provided by law, who appraised the damages by reason of the appropriation of the right of way of the said railroad to the width of one hundred feet across the appellee's farm, at the sum of seven hundred dollars. From this appraisement the appellee appealed to the circuit court, where the question of damages was tried by a jury, who returned a verdict for the appellee for one thousand four hundred and forty dollars.

A motion for a new trial was made by the appellant, assigning the following grounds:

1. That the damages are excessive.

2. In refusing to allow James Hampshire, an agent of the railway, to answer the following questions:

- “1. You may state how many cattle-guards, according to the plans for the construction of the railroad, will be put in, where, and the nature of them.

- “2. How much of the railroad on the defendant's farm will be constructed on trestle-work, and how high will the trestle-work be from the surface of the ground, and what facilities will be offered for the passage thereunder by cattle, men and teams?

- “3. State where the proposed trestle-work is to be built, and whether it will make a way for the defendant to pass from one part of his farm to the other, under the said road, free from obstruction.

- “4. State whether there is any part of the railroad across the defendant's land which will be constructed on embankments so high as to render fences unnecessary.

- “5. State whether the proposed trestle-work will be of

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such a nature that cattle cannot get upon or across the railroad upon the adjacent lands.”

3. Also, for refusing to permit Thomas G. Lytle to answer the following question :

“What would be the damage to the defendant, aside from the land taken for the right of way, providing the said railroad company furnished the necessary crossings and cattle-guards?”

4. For error of law occurring at the trial, in giving and refusing to give certain instructions, which are properly described.

It is assigned for error, that the court erred in overruling the motion for a new trial.

It is shown by the bill of exceptions that the above questions were asked of the witnesses named, and that counsel for appellee objected, which objection was sustained, and an exception taken. The ground of the objection is not shown, nor is it shown that the appellant stated to the court what facts he proposed or expected to establish by the questions asked.

In *Rawles v. The State, ex rel. Ford*, decided on the 13th of March, 1876,\* the following language was used :

“The first, second, fourth, sixth, seventh, eighth, ninth and tenth reasons stated in the motion for a new trial are based upon the refusal of the court to allow the defendant to ask certain witnesses particular questions, which are set out in the motion. It is not shown what fact the defendant proposed to prove, or that he proposed to prove any fact. It does not appear that anything material would or could have been elicited in answer to the questions. We think this mode of making up the record does not present any question. The party should state, in his offer of evidence, what he proposes to prove, and if not allowed to introduce the proposed evidence, should state in the motion for a new trial and in the bill of exceptions, in a general way, the evidence offered.

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\* A petition for a rehearing has been granted in *Rawles v. The State, ex rel. Ford*, not, however, upon the question involved in the language here quoted from the opinion. REPORTER.

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We are of opinion that to state that he asked or proposed to ask a question, which might or might not bring out material evidence, cannot be regarded as presenting any material question for decision by this court. *Curry v. Bratney*, 29 Ind. 195; *Adams v. Cosby*, 48 Ind. 153." See, also, *Lewis v. Lewis*, 30 Ind. 257.

We are of opinion that the condition of the record is such that we cannot, under the settled rules of practice in this court, pass upon any question arising out of the refusal of the court to permit the above questions to be answered.

Counsel for appellant, in their brief, complain of the action of the court in giving the second and third instructions and refusing to give the sixth instruction asked by appellant. This is regarded as an abandonment of any objection to the giving and refusing to give other instructions which are complained of in the motion for a new trial.

The second and third instructions are as follows:

"2. One item of damage to which the defendant is entitled is the value of the land actually appropriated and taken by the company; and you may add to this any injury to the residue of the land from which it is taken, naturally resulting from the appropriation and construction and operation of the road thereon, such as cutting the fields into an inconvenient and ill shape and destroying means of communication between one portion and another, as the company is under no legal obligation to afford the defendant any crossing other than highway crossings, and is entitled to the exclusive possession of the strip of land over which the right of way has been obtained.

"3. You may also consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already enclosed, as the law does not impose on the company any obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by

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them on their track, where it is not, but might be, securely fenced."

It is settled in this State, that damages may be given for cutting fields into inconvenient shapes, destroying the convenience and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof. *The White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *The Montmorency G. R. Co. v. Rock*, 41 Ind. 263; *The Montmorency G. R. Co. v. Stockton*, 43 Ind. 328; *The City of Logansport v. McMillen*, 49 Ind. 493; *The Grand Rapids & Ind. R. R. Co. v. Horn*, 41 Ind. 479.

The second and third instructions properly expressed the law, and no error was committed in giving them.

The sixth instruction asked and refused was the opposite of those given, and was correctly refused.

We cannot, under the evidence, reverse the case upon the ground that the damages are excessive.

The judgment is affirmed, with costs.

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GREGORY ET AL. v. WILSON ET AL.

**TAX.—Mortgage.**—*Crop Raised by Heirs of the Mortgagor after Foreclosure.*—A mortgage on real estate was foreclosed, and the real estate was sold under the decree of foreclosure to the mortgagee. Thereafter the mortgagor died, and afterwards a crop of corn was planted and cultivated on said land by the widow and son of the mortgagor, which fully matured before the year for the redemption of the land had expired.

*Held*, that said corn was not liable for the payment of taxes chargeable against the mortgagor.

**SAME.—Seizure of Property.**—A county treasurer could not legally seize property for taxes of the year 1873, until after the third Monday of April, 1874.

From the Morgan Circuit Court.

W. R. Harrison and W. S. Shirley, for appellants.

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*C. F. McNutt* and *G. W. Grubbs*, for appellees.

DOWNEY, J.—Two errors are assigned in this case:

1. Overruling the demurrer to the complaint and amended supplemental complaint; and,
2. Sustaining the demurrer to the second paragraph of the answer.

The pleadings are in some respects peculiar. Amanda B. Wilson, administratrix of the estate of William W. Wilson, deceased, filed a petition, as it is styled, representing that the deceased, in his lifetime, was the owner of certain real estate in the county of Morgan, which he had mortgaged to one William N. Cunningham; that at the death of said deceased, February 7th, 1873, the mortgage had been foreclosed, and the land sold to the mortgagee; that after the death of said deceased, and during the cropping season of 1873, before the time for the redemption of said land had expired, the said administratrix caused to be planted and cultivated upon said land a crop of corn, which said crop of corn fully matured before the period for redemption expired; that the estate of said deceased being wholly insolvent, the said crop was necessary to be used for the payment of the preferred claims against said estate; that, for the purpose of paying such debts, the petitioner, as such administratrix, sold and delivered said corn to one Allen Watkins, for thirty-five cents per bushel; that when said land was sold and bought by said Cunningham, there were due the taxes for several years on the land, subject to which said land was purchased by said Cunningham; that after the sale of the corn by said petitioner to said Watkins, the said Cunningham, by threats and otherwise, procured the treasurer of said county of Morgan, John N. Gregory, to seize said corn for taxes, and to advertise and sell the same for said taxes; that said sheriff [treasurer?] made said sale, subject to said previous sale, if the same should be found to be valid; that Watkins bought said corn under protest, and with the agreement and understanding that the price therefor should not be paid until the question of ownership should be determined by the court; and the plaintiff

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alleges that the said sale is wrongful, and that the said Gregory and Cunningham thereby became intermeddlers and wrong-doers.

Prayer, that the [defendants?] be enjoined and restrained from intermeddling with said estate and the property thereof and with the proceeds of said sale; that Watkins, Gregory and Cunningham be summoned to answer herein; and that upon final hearing the plaintiff have judgment for the value of said corn and other relief.

A demurrer to this complaint or petition was filed and submitted to the court, but the record does not show that it was ever decided.

Subsequently, what is denominated a supplemental complaint was filed, in which said Amanda B., as the widow of said deceased, and William V. Wilson, the only surviving child and heir of the said deceased, allege, by way of petition to be made defendants to the action and for answer to the complaint therein, that they have an interest in said cause, and as such heirs at law are entitled to the rents and profits of said land and the issues therefrom, which ought to be adjudged to the plaintiff in her action as administratrix, and claimed, as well, by said defendants; they further say that the corn crop and the proceeds thereof, which grew upon the farm mentioned in the complaint, belonged to the said petitioners, as heirs at law of said deceased; that their said ancestor died at Indianapolis, Indiana, and large expenses were incurred in the funeral of the said deceased, for the payment of which she, the administratrix, has no means; that they desire that the proceeds of said crop shall be used for said purpose, and hence were and are willing to surrender their right herein to said administratrix for that purpose; but if said administratrix cannot, as against said defendants, be allowed to take them, then they insist upon their legal rights as heirs aforesaid. Hence, they ask to be made parties, and pray judgment that the said Watkins be ordered and adjudged to pay over to them the proceeds of said rents, profits and issues, in his hands, and that the said Kennedy

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be adjudged to pay the money in his hands derived from the issues and rents of said land, and for other relief.

The defendants demurred to the "petition and complaint" of said Amanda B. and William V. Wilson, on the ground that the same did not state facts sufficient to constitute a cause of action; the demurrer was overruled, and there was an exception.

The substance of the petition, or complaint, is, that the plaintiff, as executrix, had raised a crop of corn on the land, which had been owned and mortgaged by her deceased husband, the testator, but which had, prior to his decease, been sold on a foreclosure of the mortgage to Cunningham, the mortgagee, but had not yet been conveyed; that she had, after the maturity of the crop, sold it to Watkins at thirty-five cents per bushel. How many bushels there were of the corn does not appear, but no objection to the complaint is made on this account. The object of the action, so far as Watkins is concerned, was to recover from him the price of the corn. Gregory appears to have been made a party for the reason that he, as treasurer, was asserting a claim for taxes. Why Cunningham was made a party does not fully appear.

So far as we can see, the pleading of Amanda B. and William V. Wilson, which is probably a cross complaint, if it can be classified, is sufficient as a cross complaint to authorize them to recover the amount due from the defendant Watkins for the corn purchased by him of the plaintiff, if it was owned by them, and the demurrer to it was correctly overruled. As we have seen, the demurrer to the original complaint was never decided by the circuit court, and there is, therefore, no question as to that.

The second paragraph of the answer contains, in substance, the following allegations: that one Egbert, the predecessor in office of Gregory, the treasurer, on the 15th day of October, 1872, had in his hands the tax duplicate of said county, with the proper precept directed to him by the proper officer to collect the same; that there was assessed against said deceased, and charged to him on said duplicate, and due

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from him, of state, county, and other taxes, duly and legally assessed, the sum of eight hundred dollars, which were afterwards returned delinquent and unpaid; and that there accrued and were assessed against said deceased, of such taxes, for the year 1873, the further sum of four hundred dollars; all of which said taxes were properly and legally placed, set forth, charged and assessed on the tax duplicate of said county, which tax duplicate, with the proper precept issued by the auditor of said county was, on the 15th day of October, 1873, duly delivered to the defendant Gregory for collection and enforcement, said Gregory then being the treasurer of said county, having been inducted into said office on the 6th day of August, 1873, as the successor of said Egbert; that the said taxes were a lien upon the said crops and corn set forth in the complaint; that said deceased died on the 7th day of February, 1873, being at the time insolvent; that during the year 1873, there was no other personal property of said deceased that could be seized or taken for said taxes in said county of Morgan; that the said crops and corn so seized were the one-half of the crops and corn raised by tenants of plaintiffs as heirs of said deceased upon the lands of said deceased upon which said taxes were so assessed as aforesaid; that of the said taxes and the said claims of said State and county therefor, whereby said Egbert and said Gregory levied upon and seized said crops and corn to be sold to pay said taxes, the plaintiff had notice at and during all the time aforesaid, and of which said Watkins also had notice before he purchased said corn; and that said taxes still remain due and unpaid and a lien upon the price of said corn in the hands of said Watkins; wherefore, etc.

The objection to this paragraph of the answer, urged by the appellees, is, that it fails to show that the crop of corn was liable to seizure for the payment of the taxes in question. They claim that the crop was not the property of the deceased, against whom the taxes were assessed; that it had no existence at the time of his death, but was made wholly by the labor of the appellees after his death; that it belonged

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to them; that they took possession of the land as his heirs; they raised the crop of corn upon it, but it did not become liable or subject to the lien of the taxes. They say the lien of the taxes followed the land and what other property Wilson had when the duplicate came into the hands of the treasurer, but could not follow and attach to property that had no existence at the time of his death, but was created entirely by the labor of appellees after his death.

On the other hand, it is claimed that the statute makes the land mortgaged taxable to the mortgagor until the mortgagee shall take possession; that Cunningham did not get possession until after the crop of corn matured in 1873. It then remained the property of William W. Wilson and, after his death, his heirs, the said Amanda B. and William V. Wilson, until after the time for redemption had expired; that to make this point still stronger against the said Amanda B. and William V., as to the tax of 1873, they became the owners of the land on the death of said deceased, in February, 1873, and, being the owners in April, were liable, under the statute, to pay the taxes of that year, and the treasurer had the right to seize the corn for the taxes of that year; that the administratrix had no right to claim the same to pay debts, funeral expenses, or any other debts as against the right of the State and county for taxes; that whether the estate was solvent or insolvent, the said Amanda B. and William V. could not give it to the administratrix so as in any manner to affect the rights of the treasurer. It is urged that there is no such thing as a tax upon land or personal property irrespective of an owner, and that the law provides who that owner is, and that in this case the widow and child were the owners after the death of the deceased.

It is alleged in the answer, that the corn in question was one-half of the crop raised on the mortgaged premises by the tenants of the widow and child of the deceased.

It appears to us that this allegation is in contradiction of the allegation in the complaint that the administratrix caused the crop to be planted and cultivated. We must

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regard this answer as averring that the crop was raised by the widow and son of the deceased, and not by the widow as administratrix, and must judge of the sufficiency of the second paragraph of the answer in that view of it.

This crop of corn was wholly grown and produced after the death of the deceased, and while the widow and son of the deceased were, by their tenants, in possession of the land on which it was raised, and nominally, at least, the owners thereof; and we do not think it ever was the property of the deceased or liable for the payment of the taxes for the years prior to 1873, charged against him.

But it is claimed that it was liable to be seized as the property of the widow and son of the deceased, on the ground that, as the land descended to them at his death, in February, 1873, they were chargeable with the taxes for that year. If it be conceded that they were liable for the payment of the taxes on the land for the year 1873, it does not follow that the corn in question was liable to be seized for the taxes at the time when it was done. The treasurer could not legally have seized the corn for the taxes of that year until after the third Monday of April, 1874. Acts 1872, Spec. Ses., 101, sec. 155. Formerly the time was the third Monday of March. See *Veit v. Graff*, 37 Ind. 253.

We must hold the action of the court in sustaining the demurrer to the second paragraph of the answer correct.

The judgment is affirmed, with costs.

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52	239
168	667

### GLASGOW ET AL. v. HOBBS ET AL.

**INTERROGATORIES TO JURY.**—*When to be Presented to Court.*—When interrogatories to be propounded to the jury have been presented to the court by a party after the commencement of the argument of the cause, there is no error in refusing to submit them to the jury.

**EVIDENCE.**—*Variance.*—Suit on a note, alleged in the complaint to have

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been made by A., B. & Co. The note introduced in evidence purported to have been made by A. & B. & Co.

*Held*, that there was no material variance.

From the Ripley Common Pleas.

*G. Durbin* and *J. O. Cravens*, for appellants.

*M. K. Rosebrough* and *Browne, Lamb & Kimball*, for appellees.

BUSKIRK, J.—The appellees sued the appellants and James L. and Abraham Yater, upon a promissory note executed in the firm name of Yater, Bro. & Co., and upon an account for goods and merchandise sold and delivered to the said firm. The two Yaters did not answer, nor were they defaulted. They seem to have dropped out of the case.

The appellants answered in four paragraphs. The first was a special plea of *non est factum* as to the note; the second, the general denial; the third, payment; the fourth was, in substance, as follows:

That the goods, for which the action was brought and for which the note was given, were purchased of Hobbs & Parker by the firm of Yater, Bro. & Co., which was composed of James L. Yater, Abraham Yater, William R. Glasgow and Addison J. Harding; that said firm was dissolved on the 26th day of May, 1866; that there were two firms, doing a separate business, in Osgood, at the time of the dissolution of the firm of Yater, Bro. & Co., namely, the firm of Yater, Bro. & Co. and the firm of Yater & Bro.; that on the 20th day of July, 1866, it was agreed by and between Glasgow and Harding, Hobbs & Parker, and Yater & Bro., that Yater & Bro. should assume the indebtedness of Yater, Bro. & Co. to Hobbs & Parker, and that Hobbs & Parker would accept the obligation of Yater & Bro. for the indebtedness of Yater, Bro. & Co., and release Glasgow and Harding, and that Glasgow and Harding should pay to Yater & Bro. their proportion of the indebtedness of Yater, Bro. & Co. to Hobbs & Parker; that, in pursuance of said agreement, said Yater & Bro. executed their note to Hobbs & Parker for two hundred and forty-eight dollars and eighteen

cents, payable in bank, at sixty days; that Hobbs & Parker accepted the same in discharge of their demand against Yater, Bro. & Co.; that after the execution and delivery of the note, and before suit had been instituted thereon, and before any demand had been made by Hobbs & Parker upon Glasgow and Harding, they paid to Yater & Bro. their full proportion of the indebtedness in controversy.

Demurrers were overruled to the first and fourth paragraphs, but no question is made in reference to such rulings.

The plaintiffs replied in two paragraphs. First, in denial. The second paragraph was struck out.

The cause was tried by a jury, who rendered a general verdict in favor of plaintiffs and answers to interrogatories.

The errors assigned call in question the action of the court in refusing to submit certain interrogatories to the jury, as requested by appellants; in overruling the motion for judgment in favor of the appellants upon the answers to interrogatories; and in overruling the motion for a new trial.

It is shown by the bill of exceptions, that the interrogatories which the appellants asked the court to submit to the jury were handed to the court after the argument of the cause had commenced. The court properly refused to submit them. They should have been handed to the court before the argument commenced. Buskirk's Pr. 213, and cases cited. The court might, but was not bound to, submit them when presented too late. Buskirk's Pr. 213.

Did the court err in refusing to render judgment upon the special findings in favor of the appellants? The interrogatories and answers were as follows:

"1. Was the firm of Yater, Bro. & Co. dissolved prior to the execution of the note in suit? Answer. Yes.

"2. If so, had plaintiffs, or either of them, notice of it? Answer. Yes.

"3. Was said note executed under the name of Yater & Bro.? Answer. No.

"4. If not, and the note was executed in the name and

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style of Yater, Bro. & Co., was it so executed with the knowledge and consent of Glasgow and Harding at the time? Answer. Yes.

“5. Was the contract alleged in the fourth paragraph of the answer entered into by and between Hobbs & Parker and Yater & Bro. and Glasgow and Harding? Answer. No.

“6. If so, did Glasgow and Harding pay their share of the debt of the firm of Yater, Bro. & Co. owing to Hobbs & Parker to the firm of Yater & Bro. before the commencement of this suit? Answer. Yes.”

We are very clearly of opinion that the motion was properly overruled. There was no inconsistency between the general and special verdicts. The latter fully sustained the former.

The fourth finds that the note was executed in the name of Yater, Bro. & Co., with the knowledge and consent of the appellants.

The fifth finds that the agreement set up in the fourth paragraph of the answer was not entered into. The payment by the appellants of their proportion of the indebtedness sued for to Yater & Bro., in the absence of any agreement, could not, and did not, affect their liability to the appellees. There was no ground upon which the appellants were entitled to a judgment in their favor upon the special findings.

It is, in the first place, insisted, in support of the second assigned error, that the court admitted illegal evidence upon the trial. The note described in the complaint purported to have been executed by Yater, Bro. & Co. The one offered in evidence purported to be executed by Yater & Bro. & Co. When it was offered, the appellants objected to its admission in evidence upon the ground of variance. The objection was overruled, and the note read in evidence.

We think there was no variance between the note declared on and the one produced in evidence. They were in legal effect the same. But the variance, if any existed, was wholly

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immaterial, and did not prejudice the appellants in their defence. The discrepancy between the note declared on was amendable below, and will be deemed amended here. See Buskirk's Pr. 337-340.

We have carefully read and considered the evidence, and think it fully supports the verdict.

The judgment is affirmed, with costs.

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#### HARBAUGH v. HOHN ET AL.

**FRAUD.—Action to Set Aside Fraudulent Judgment.—Pleading.**—Where, in a proceeding to foreclose a mortgage on land, judgment had been fraudulently taken for a larger amount than was due, the plaintiff in a subsequent judgment, which was a lien on the same land, not a party to such foreclosure suit, might maintain an action to set aside such judgment of foreclosure as void, and it was not necessary that his complaint should set out a complete record of the foreclosure suit.

From the Hamilton Circuit Court.

*D. Moss* and *F. M. Trissal*, for appellant.

*J. W. Evans* and *R. R. Stephenson*, for appellees.

**DOWNEY, J.**—The appellees Hohn and Bates sued the appellant, Charlotte Harbaugh, and others. They allege in their complaint, in substance, that they had recovered a judgment, before a justice of the peace, for sixty-seven dollars and eighty-seven cents, against Francis M. Harbaugh and Spencer Hubble; that an execution thereon had been issued and returned no property found, and that they had caused a transcript of the judgment to be filed, etc., in the clerk's office, which had become a lien on real estate of Francis M. Harbaugh; that said Charlotte Harbaugh held a mortgage on the same real estate of an older date and prior lien; that she foreclosed her mortgage, and, combining with said Francis M. to defraud plaintiffs, fraudulently took judgment, by

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Harbaugh v. Hohn *et al.*

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default, for four hundred and twenty-four dollars and forty-five cents, when there were only one hundred dollars due her. It is alleged that said real estate is all the property the debtors, or either of them, had subject to execution, and that there are other judgments, which are liens on said property, to the amount of two hundred and fifty dollars; that the real estate is not worth more than six hundred dollars, and that the property is about to be sold on the foreclosure judgment, etc. Prayer, that the judgment of foreclosure be declared void, etc.

A demurrer to the complaint was filed by the defendants, on the ground that the same did not state facts sufficient to constitute a cause of action, and it was overruled by the court.

An answer, consisting of a general denial, was filed, and there was a trial by the court, and finding and judgment for the plaintiffs.

The error assigned is the overruling of the demurrer to the complaint.

Counsel for appellant submit, that if the plaintiffs have any remedy, it is in some of the proceedings authorized for the purpose of reviewing judgments; and they cite *Quick v. Goodwin*, 19 Ind. 438. That case is not in point here. There the party who filed the complaint was a party to the judgment attacked. Here the complainants were not parties to the judgment. One not a party to a judgment or in privacy cannot sustain a complaint to review. 2 G. & H. 279, sec. 586; *Owen v. Cooper*, 46 Ind. 524.

Section 17 of the statute of frauds, 1 G. & H. 352, is as follows:

“All conveyances or assignments in writing or otherwise, of any estate in lands, or of goods, or things in action, every charge upon lands, goods, or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay, or defraud creditors, or other persons of their lawful damages, forfeitures, debts, or demands, shall be void as to the person sought to be defrauded.”

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The same law that allows a judgment creditor to file a complaint to set aside a fraudulent conveyance of land by the debtor, on which his judgment is a lien, before he sells the land on execution, should be held to authorize him to sustain a complaint to set aside incumbrances fraudulently placed upon the land to protect it from the just claims of creditors. The statute quoted expressly declares judgments suffered by the debtor, to defraud creditors, void, and we think it is proper to allow the judgment creditor to sustain a complaint to clear them away before he proceeds to sell the land. Whether the fraudulent act of the debtor be a deed, a mortgage, or a judgment, it seems to us that, in either case, the creditor may have the same set aside before a sale of the land. *Adkins v. Nicholson*, 39 Ind. 535; *DeArmond v. Adams*, 25 Ind. 455; *Harker v. Glidewell*, 23 Ind. 219; *Feaster v. Woodfill*, 23 Ind. 493. It can make no difference whether the judgment is by confession or by default.

It is submitted by appellant, that the plaintiffs should have caused themselves to be made parties to the foreclosure suit, and contested the amount of the claim asserted against the property by her in that action. We cannot think that there is any good ground for this position. The complaint, the sufficiency of which we are considering, does not show that the plaintiffs in this action had any notice of the pendency of the action, and they were not even parties thereto.

It is further submitted, that the complaint should have brought before the court a complete record of the foreclosure suit, and that it is insufficient for that reason. This is the rule applicable to complaints to review judgments. There is a reason for this, which is, that in such proceeding the court sits as a court of errors, in some sense, and should have the entire record before it. But we are not aware that the same rule applies to a complaint to set aside a false and fraudulent judgment, at the suit of creditors. We see no good reason for applying such a rule in that kind of cases.

The judgment is affirmed, with costs.

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 Willey v. The State.
 

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58	246
124	384

### WILLEY v. THE STATE.

**CRIMINAL LAW.—Grand Jury.**—*Where County Commissioners Have Failed to Select.*—At the March session, 1874, of a board of county commissioners, two grand juries were selected according to law, one for the March term and one for the June term, 1874, of the circuit court, and no grand jury for the October term, 1874, or for the January term, 1875, was ever selected by the commissioners. At the October term, 1874, said court ordered that the grand jury be summoned to appear on the second day of the next term of said court, and the grand jury so selected for the June term, 1874, assembled under said order at the January term, 1875.

*Held*, that said order for the summoning of a grand jury at the January term, 1875, was sufficient, and that said grand jury was competent to find an indictment at said January term.

**SAME.—Indictment.—Abortion.**—In an indictment for an attempt to procure an abortion, an averment that the procurement of the miscarriage was not necessary to preserve the life of the woman is equivalent to an averment that the miscarriage was not necessary to preserve her life.

**SAME.—Contradictory Statements in Bill of Exceptions.**—Where, in a bill of exceptions in a criminal action, it was stated that the defendant pleaded not guilty, and also that he consented that the court should find him guilty and sentence him to imprisonment for a certain period, and there was a verdict of guilty, and a motion for a new trial, because of the insufficiency of the evidence, was overruled, the Supreme Court took the view most favorable to the defendant, and treated the case as one in which there had been a plea of not guilty, and, the evidence in the record being insufficient, reversed the judgment.

From the Carroll Circuit Court.

*H. C. Thornton* and *A. H. Dame*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

**DOWNEY, J.**—This was an indictment against Sylvester Willey and the appellant, Sarah Willey. The case originated in the county of White, and the venue was changed to Carroll.

The indictment charges that Sylvester Willey and Sarah Willey, late of said county, on, etc., at, etc., did unlawfully and feloniously kill Mary L. Willey, by then and there unlawfully, wilfully and feloniously employing a certain instrument, to the grand jurors unknown, upon the body of the said Mary L. Willey, who was then and there a

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pregnant woman, by then and there unlawfully introducing said instrument into the womb of the said Mary L. Willey, with the intent then and there and thereby to procure the miscarriage of the said Mary L. Willey, neither the employment of said instrument nor the procurement of said miscarriage being then and there necessary to preserve the life of the said Mary L. Willey, contrary to the statute, etc.

The defendants pleaded, in abatement, that the indictment was found at the January term, 1875, of the White Circuit Court; that the board of commissioners of the county of White, at their March term, 1874, which was their first regular session in said year, on the 7th day of March, 1874, with the assistance of the clerk of the White Circuit Court, in the manner provided by law, proceeded to draw twelve grand jurors for said White Circuit Court; and said board of commissioners, on said day, did, in like manner, as aforesaid, proceed to draw twelve other grand jurors for said White Circuit Court; that said two grand juries, so drawn as aforesaid, were all the grand jurors or names of persons to act as grand jurors, drawn or selected by said board of commissioners and said clerk at any time from the March term, 1874, to the March term, 1875, of said board of commissioners; that the auditor of said county recorded among the records of said board of commissioners the names of the persons so drawn as aforesaid, and delivered a certificate thereof to said clerk, who recorded the same on the order book of said White Circuit Court; and that the names of said persons, so drawn as and for grand jurors, were recorded on the order book of said White Circuit Court.

It is further alleged, that the said board of commissioners and said clerk, at said March term, 1874, drew two grand juries, and no more, as above set forth; nor did said board of commissioners and said clerk, at any other time during said year 1874, draw any other persons to act as grand jurors than as above alleged; that said two panels of grand jurors, so drawn as aforesaid, were for the March term and

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the June term, 1874, of said White Circuit Court, and there were no grand jurors drawn by said board of commissioners and said clerk for the October term, 1874, and the January term, 1875, of said White Circuit Court.

It is then alleged, that Hon. David P. Vinton was the judge of said circuit court when said indictment was found and returned, and had been for two years prior thereto; that said judge made no order requiring the clerk to issue a *venire* for any grand jury to appear on any day of said January term, 1875, of said court, nor at said term; that said White Circuit Court made an order, of which the following is a copy: "And it is further ordered by the court, that the grand jury be summoned to appear on the second day of the next term of this court;" which said order was made at the October term of said court, 1874, and entered on the order book of said court, which is the only order in the premises under which said body of men assembled, which found and returned said indictment; that no order was made by said judge requiring the said clerk to issue a *venire* for the grand jury drawn and selected for said January term, 1875, nor was any such grand jury drawn and selected at any time.

The defendants say that said indictment was found and returned by the body of men drawn as aforesaid for the second session of said White Circuit Court, which said body of men were drawn for the June term, 1874, of said circuit court, but were not drawn for said January term, 1875, and had no legal right or authority to act as grand jurors for said term, or to find and return the said indictment. The defendants, protesting and declaring their innocence, and saying they are not guilty of said charge in said indictment set forth, say that said body of men which found said indictment was illegal and void, by reason of the premises aforesaid, and was not a legal grand jury, which could find or return said indictment; that said body of men, which pretended to act as said grand jury, had no legal authority or right to find or return said indictment; that said indictment

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and each and every act of said body of men was illegal, fraudulent and void. Wherefore, etc.

A demurrer to this plea in abatement was filed by the prosecuting attorney, and sustained by the court.

A motion to quash the indictment was made by the defendants, and overruled by the court.

The defendants pleaded not guilty, and elected to be tried separately. The bill of exceptions shows, that, after the trial of Sylvester Willey, the said appellant waived a jury, and, by her agreement, the cause was submitted to the court for trial, and that "it was agreed between the counsel for the State and the counsel for the defendant, that the evidence heard in the cause against Sylvester Willey should be considered as the evidence in this cause, and it was also agreed that the court should find defendant guilty, and fix her punishment at imprisonment in the state prison for a term of four years. Said agreement was made in open court, and in the presence of defendant, and she assented thereto. Said evidence was as follows." The evidence in the case against Sylvester Willey is then set out. The court found the defendant guilty, fixed her punishment at four years' imprisonment in the state female prison at Indianapolis, overruled a motion made by her for a new trial and in arrest of judgment, and sentenced her according to the finding.

Errors are assigned as follows:

1. Sustaining the demurrer to the plea in abatement.
2. Overruling the motion to quash the indictment.
3. Refusing to grant a new trial.
4. Overruling the motion in arrest of judgment.

We are of the opinion that the plea in abatement is not sufficient. It alleges, in effect, that, at the March session of the board of commissioners in 1874, two grand juries were selected, and that they were for the March and June terms, 1874, of the court, and that no grand juries for the October term, 1874, and the January term, 1875, were ever selected. In this condition it was proper to empanel a grand jury

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according to sec. 10, 2 G. & H. 433. The section is as follows:

“A panel of grand jurors may be filled in whole or in part, when necessary, by summoning the requisite number of freeholders or householders of the proper county under the direction of the court who shall in the discretion of the court be selected from persons residing in the several townships, unless in consequence of delay in filling the panel, or for other satisfactory reasons, the court shall otherwise direct.” *Hardin v. The State*, 22 Ind. 347; *Ward v. The State*, 48 Ind. 289.

We think the order for summoning a grand jury at the January term was sufficient. It is urged that it is insufficient, because it appears to have been made by the court, and not by the judge, as required by the act of March 10th, 1873. Acts 1873, p. 158. We think the order made must be regarded as having been made by the judge. We do not see that the order could have been made by the court without having been made by the judge. It may be doubtful whether any such previous order for summoning the grand jury is at all necessary, when, as in this instance, no grand jury had been selected for the term. The fact alleged, that the grand jury was made up of the same men selected to serve as grand jurors at the June term, 1874, is no ground for quashing the indictment. It is objected that, in this way, the same persons might be selected to serve on the grand jury for two terms in the same year, in violation of sec. 7, 2 G. & H. 432. It is enough to say, now, that in this case such could not have been, for the two terms of court were in different years.

It is urged that the indictment is bad, for the reason that it does not show that the miscarriage was not necessary to preserve life, according to the decisions in *Bassett v. The State*, 41 Ind. 303, and *Willey v. The State*, 46 Ind. 363.

The case at bar is clearly distinguishable from the cases cited. To say that the procurement of the miscarriage was not necessary to preserve life is equivalent to saying that

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the miscarriage was not necessary to preserve life, at least in its application to the statute on which, in part, the indictment is founded. Sec. 36, 2 G. & H. 469. Procurement is defined to be "the act of procuring, obtaining, bringing about, or effecting," etc. Webster. We must not require too much exactness in the use of words.

Upon this assignment, the case presents itself in an unusual aspect. The clerk's entries show a regular trial of the cause by the court, as in ordinary cases; but the bill of exceptions shows, as before stated, that no witnesses were examined, and that the case was submitted on the same evidence given in the case of Sylvester Willey, previously tried, the defendant agreeing that the court should find her guilty, and fix her punishment at imprisonment for four years. How is the case to be regarded? We have read the evidence, and are clearly of the opinion that it makes no case against the defendant. If the case is to be treated as one where the defendant pleaded guilty, the judgment ought to be affirmed. If, on the other hand, it is to be treated as depending upon the sufficiency of the evidence, and as one where there has been no plea of guilty, it should be reversed. Not only the clerk's entries, but also the bill of exceptions, show that the defendant pleaded not guilty. We have, then, two contradictory statements in the bill of exceptions, one that the defendant pleaded not guilty, and the other that she consented that the court should find her guilty and send her to the state prison for four years. We solve the difficulty by adopting that view of the case most favorable to the prisoner, and treating the case as before us on the sufficiency of the evidence. As we have already said, the evidence did not warrant the conviction, and there is no other course for us but to reverse the judgment.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial. The clerk will certify to the superintendent of the prison.

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BINGHAM v. ELMORE.

INSTRUCTIONS TO JURY.—*Record*.—Where an instruction given to the jury was not incorporated in a bill of exceptions, or signed by the judge or by the attorney of the defendant, there being at the bottom of it the words “given and excepted to,” signed by the attorney of the plaintiff;  
*Held*, on appeal by the plaintiff, that the instruction could not be regarded as a part of the record.

From the White Circuit Court.

*A. W. Reynolds* and *Huff, Nichol & Buell*, for appellant.

*D. Turpie* and *H. D. Pierce*, for appellee.

DOWNEY, J.—The only question submitted for our decision in this case is as to the correctness of an instruction given by the court.

Counsel for the appellee, who was the defendant below, contend that the instruction is not properly in the record, and that therefore the question is not before us. The instruction is not in any bill of exceptions, nor is it signed by the judge or by the attorneys of the defendant. There is this entry at the bottom of it: “Given and excepted to,” signed by the attorney of the plaintiff.

We think the instruction is not properly in the record. *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325; *Etter v. Armstrong*, 46 Ind. 197.

The judgment is affirmed, with costs.

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HASSELMAN ET AL. v. DOUGLASS ET AL.

PARTNERSHIP.—*Sale of One Partner's Interest*.—*Indebtedness of Such Partner to Firm*.—A. and B. being partners, the former owning an undivided five-sixths interest, and the latter an undivided one-sixth interest in the property of the firm, A., by a written agreement, sold his said interest to C., being the undivided five-sixths of certain specified property “and generally all property of every name, or kind, or description, belonging or

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appertaining to" said firm, with all the interest of A. in all notes and book accounts belonging to said firm, C. paying therefor a certain sum and giving his notes to A. for a balance of the purchase-money, and agreeing to assume and save A. harmless from "all debts, liabilities and contracts of" said firm, growing out of or connected with its partnership business, whether such debts and liabilities appeared on the books of the firm or otherwise; it being agreed that said sale embraced the interest of A. "in all assets of every kind belonging to said firm and appertaining to said partnership business."

*Held*, in an action brought by A. against C. on said notes given for purchase-money, that, in the absence of fraud or warranty as to the interest of A., said sale did not transfer to C. as assets of the partnership a debt due to the firm from A. as a partner, not appearing on the partnership books; and that such indebtedness of A. to the firm could not constitute a set-off or counter-claim in such action on said notes, though at the time of the action the debts of the firm had been paid, and the assets had been divided and the business settled between B. and C., and B. had received his share of said indebtedness of A. to the firm.

From the Marion Superior Court.

*A. G. Porter, B. Harrison and C. C. Hines*, for appellants.

*C. Baker, O. B. Hord, A. W. Hendricks and W. S. Barkley*, for appellees.

BIDDLE, C. J.—By this action the appellees, Samuel M. Douglass and James G. Douglass, sought a foreclosure of a mortgage given by appellants, L. W. Hasselman and W. P. Fishback, to secure the payment of certain notes specified in the mortgage, and the performance by Hasselman of an agreement made by him with the appellees and Mr. A. H. Conner.

The appellants answered in seven paragraphs. A general denial was replied to the first, second and fifth paragraphs of the answer, and demurrers were sustained to the third, fourth, sixth and seventh. The cause proceeded to final judgment at special term in the court below, and the judgment was affirmed at general term. From that judgment of affirmance this appeal is brought.

A reversal of the judgment is asked solely upon the

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ground that the court erred in sustaining demurrers to the third, fourth, sixth and seventh paragraphs of the answer. All other questions are expressly waived in the argument of counsel for appellants.

The third paragraph of the answer, answering as to the sum of twenty thousand dollars and by way of cross bill, admits the execution of the notes, mortgage and written agreement, avers the joint interest of Mr. Fishback in the subject of the contract; that the firm of Douglass & Conner was composed of the plaintiffs and Alexander H. Conner and William R. Holloway, Conner and Holloway respectively owning an interest of a sixth in the firm, and each of the plaintiffs a third. It alleges that by said agreement Hasselman, for himself and Mr. Fishback, was entitled to five-sixths of all the assets of the firm, including all its credits and moneys owing to it, whether from the partners among themselves or from strangers; that at the time of the sale the two Douglasses and Conner had each a private account with the firm of Douglass & Conner, which accounts were exhibited to Hasselman and Fishback, the state of which then appeared to be this: James Douglass owed the firm eight hundred and fifty-five dollars; Conner, three hundred and thirty-one dollars and eighty-six cents; Holloway, two hundred and seventy-seven dollars and three cents (since paid); and Samuel Douglass had a credit due him of three hundred and fifty-two dollars and forty-six cents; that Hasselman and Fishback, in discharge of the obligation assumed in the written agreement to pay the debts of the said firm, paid to Samuel Douglass said balance so appearing to be owing to him, and that James Douglass and Conner paid to them and Holloway the balance, as shown by the books to be owing by them to said firm; that the books did not show the true state of the accounts of the two Douglasses and Conner with the firm; that, on the contrary, James Douglass had received a large sum of money belonging to the firm, viz., seventy-five thousand five hundred and ten dollars and forty-four cents, which had not been charged up to him on the partnership

books, and of which twenty-four thousand dollars was owing by him to the firm; that Samuel Douglass and Conner had each received of the partnership assets large sums, viz., the former seventy-eight thousand six hundred and fifty-four dollars and twenty cents, and the latter twenty-six thousand one hundred and thirty-two dollars and forty cents, which they had never reported, and which had not been charged against them on the books of the firm, of which Samuel Douglass owed the firm ten thousand dollars, and Conner owed five thousand dollars. Bills of particulars were filed exhibiting the sums so collected, and also a statement of the private account of Holloway with the partnership. The paragraph then alleges, that if the private accounts of the partners were correctly adjusted, there would be a large sum coming to Hasselman and Fishback—from the two Douglasses, twenty-four thousand dollars, and from Conner, five thousand dollars. The paragraph then states, that after the purchase by Hasselman and Fishback of the interest of the Douglasses and Conner, Conner, having been required to account for his one-sixth interest in said moneys, paid to Holloway a sum which was accepted in full of Holloway's share thereof, but that the two Douglasses and Conner have failed and refused to account with Hasselman and Fishback, and that their share in the amount due upon said several private accounts remains wholly unpaid. They allege, that upon a settlement the Douglasses owe them twenty thousand dollars, which ought to be credited upon the notes in suit. Holloway and Conner are made parties to the cross bill and required to answer. Prayer for an accounting, and that the amount due to Hasselman and Fishback be credited upon their notes.

The fourth paragraph of the answer is pleaded as a set-off as to twenty thousand dollars of the debt named in the complaint. It admits the execution of the notes, mortgage and written agreement, and alleges the joint interest of Mr. Fishback in the subject of the contract, as in the preceding paragraph. It alleges also a performance by Hasselman and

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Fishback of the conditions of the agreement, except payment of the notes, which they have, it alleges, refused to pay, because the Douglasses have refused to credit and allow them their just set-off. It states that, by the terms of the agreement, Hasselman (for himself and Fishback) became owner of five-sixths of all the property and assets of the firm of Douglass & Conner, including all the credits due the firm, as well from the partners on their private accounts as from strangers; that plaintiffs represented to them after the sale that the firm owed Samuel Douglass three hundred and fifty-two dollars and forty cents on his private account; that James Douglass owed the firm eight hundred and fifty-five dollars; and that they, believing these representations, paid to Samuel the sum represented to be due to him, and received from James the sum represented to be owing by him; that these representations were false, as plaintiffs knew, there being really due from them to the firm, for firm moneys collected and received by them and appropriated to their joint use, twenty-four thousand dollars. The paragraph further alleges that Hasselman and Fishback have paid all the debts of the firm, and that all the assets have been divided and the business settled between Holloway and them, and that Holloway has received his full one-sixth share of said debts due from the Douglasses. Hasselman and Fishback then offer to set off against the claim of plaintiffs the sums alleged to be due from them as aforesaid, and also three hundred and fifty-two dollars and forty cents paid to Samuel M. Douglass.

The sixth paragraph of the answer is also pleaded by way of set-off as to twenty thousand dollars, part of the debt sued for. It admits the execution of the notes, mortgage and agreement, and the joint interest of Mr. Fishback in the subject of the contract, as in the preceding paragraph; it avers that it was the intent of the agreement that Hasselman (for himself and Fishback) should, in consideration of the money paid and agreed to be paid to plaintiffs and Conner, and of their consent to pay all the debts of the firm of Douglass &

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Conner, have five-sixths of all the assets of the firm which might, if the firm had continued, have been made available to pay debts or to divide among the partners; that it was mutually understood by the Douglasses and Hasselman and Fishback that the agreement transferred to them five-sixths of any debts which were owing by the Douglasses jointly, or by Conner, to said firm, and that Hasselman and Fishback, on the other hand, assumed to pay, with Holloway, any debts which said firm was owing to the plaintiffs jointly or severally, or to Conner; that, in pursuance of this mutual intent, Samuel Douglass presented a claim against the firm of Douglass & Conner for three hundred and fifty dollars, which defendants and Holloway paid to him; James G. Douglass represented that he owed the firm eight hundred and fifty-five dollars, and no more, and paid it to defendants and Holloway; Conner represented that he owed the firm three hundred and thirty-one dollars and ninety-six cents, and no more, and paid it to defendants and Holloway. The paragraph then avers that, in truth, at the time of the sale, the plaintiffs had in their possession twenty-four thousand dollars in money of the property and assets of the firm, which they held in trust for the firm, and five-sixths of which, by the contract, passed to and became the property of Hasselman and Fishback; that they still retain the money, and have, though requested, failed to pay, etc.; that Hasselman and Fishback, with Holloway, have paid all the firm debts, and the Douglasses have paid to Holloway a sum which he accepted in full of his share of the moneys held by them, and that the five-sixths thereof is due from plaintiffs to Hasselman and Fishback.

The seventh paragraph admits the execution of the notes, mortgage and agreement, and alleges the joint interest of Mr. Fishback in the subject of the contract and the intent of the parties, as in the preceding paragraph; that, at the time of the sale, there was deposited with the Douglasses twenty-four thousand dollars of the moneys of the firm of

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Douglass & Conner, which was held by them for the current use of the firm, was a part of its assets, and had never been set apart as profits, but was liable for the debts of the firm, and, as such assets, five-sixths passed to Hasselman and Fishback; that the Douglasses still retain the money, and refuse, though requested, etc., to pay, etc.; that Hasselman and Fishback, with Holloway, have paid all the firm debts, and that the Douglasses have paid to Holloway a sum which he has accepted in full of his share of said moneys held by the Douglasses, and that five-sixths of said sum, viz., twenty thousand dollars, is due, etc.

Inasmuch as the sufficiency of the paragraphs of the answer in question will mainly depend upon the proper construction to be placed upon a written agreement filed with and made a part of the complaint, we set it forth in full, as follows:

“This agreement, made this 7th day of June, A. D. 1870, between Samuel M. Douglass, James G. Douglass and Alexander H. Conner, of the first part, and Lewis W. Hasselman, of the second part: whereas the parties of the first part and William R. Holloway are joint proprietors of all the property, real and personal, appertaining to the printing and publishing establishment commonly known as the ‘Journal office,’ and are partners in carrying on the business of the same, under the firm name of Douglass & Conner, the interest of the said parties of the first part in said property, business and partnership being the undivided five-sixths thereof, and that of said Holloway being the remaining one-sixth; and whereas said parties of the first part have this day sold all their said interest to the party of the second part, on the terms and conditions hereinafter mentioned; now, therefore, this agreement witnesseth:

“1. That the said parties of the first part have sold, and agree to convey to said party of the second part, the undivided five-sixths of all the real estate appertaining to said ‘Journal office,’ and also the undivided five-sixths of eighty acres of land lying in the State of Missouri.

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"2. The undivided five-sixths of all the fixtures and machinery, types, presses, and binders' tools and presses, stereotype foundry and fixtures, and all stock of every name or kind on hand, and all ordered, but not yet received, including paper and binders' leather, inks, etc., and generally all property, of every name or kind or description, belonging or appertaining to said 'Journal office,' or to said firm of Douglass & Conner, including the good-will of the daily and weekly Journal newspapers.

"3. Also, all their interest in all notes and book accounts belonging to said firm of Douglass & Conner, and in all work now in progress in said printing establishment, of said firm, and in the subscription lists of the 'Indianapolis Daily Journal' and 'Weekly Indiana State Journal.'

"4. Also, all the rights and interest of the parties of the first part in the 'Western Associated Press dispatches.' Also, all partners' liens they have on the said partnership property and assets as between them and their said partner.

"5. In consideration of all which, the said party of the second part has agreed to pay to the said parties of the first part the sum of one hundred and five thousand dollars, as follows: one-fourth thereof, being twenty-six thousand two hundred and fifty dollars in cash down, one-fourth in one year, one-fourth in two years, and one-fourth in three years from this date, said deferred payments bearing interest at the rate of seven per centum per annum, and to be secured by notes of the party of the second part, waiving valuation laws.

"6. In further consideration of the premises, said party of the second part hereby promises and agrees to assume all debts, liabilities and contracts of the said existing firm of Douglass & Conner, growing out of, or connected with, the business of said printing establishment, including a certain subscription of one thousand dollars to the stock of the New Hotel Company, to the full extent to which the said parties of the first part are or may become liable to pay the same; that is to say, the said party of the second part agrees to

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assume and pay the same in the same manner and to the same extent as he would be liable to pay the same if he, instead of the said parties of the first part, composed, together with the said Holloway, the said existing firm; and he, said party of the second part, promises and agrees to save said parties of the first part harmless from all such debts, liabilities and contracts of said existing firm.

“The parties are not, at this time, prepared with an exact schedule of said debts, liabilities and contracts; and it is agreed and understood that the party of the second part has had, and has, access to the books of said firm of Douglass & Conner and that he assumes the same, whatever they may be.

“[The parties of the first part guaranty that all the debts so assumed appear on the books of the parties of the first part, except said hotel subscription and small current bills not yet sent in, but that the amount of said current bills not yet sent in and entered does not exceed three hundred dollars.\*]

“7. It is further agreed that the said party of the second part shall execute, or cause to be executed, and deliver concurrently herewith, to the party of the first part, a mortgage on sufficient real estate to secure the payment of the aforesaid three notes for purchase-money, and to indemnify the parties of the first part against all liabilities as aforesaid, as members of the existing firm of Douglass & Conner.

“8. The real estate, of which the undivided five-sixths was sold as aforesaid, is the following: one parcel, conveyed to said Douglass & Conner by the trustees of the First Presbyterian Church of Indianapolis, January 15th, 1866, and recorded in Town Lot Records No. 29, page 168, of Marion County Deed Records. Also, two parcels, conveyed by William A. Morrison and wife to same, June 28th, 1866, and recorded in same book, page 439. Also, eighty acres, conveyed to said Douglass & Conner and Holloway, Decem-

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\* This clause of sixth paragraph, in brackets, was erased.

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ber 17th, 1867, recorded in Record A, pages 305 and 306, in Reynolds county, Missouri, records.

“9. The deeds for said real estate to be warranty deeds, excepting an incumbrance of seven thousand five hundred dollars, being a mortgage lien upon that portion of the real estate situate in Indianapolis, that being a portion of the indebtedness of the existing firm assumed by the party of the second part as aforesaid, and excepting also the one-half of all taxes on the real estate for the current year.

“10. Deeds to be delivered, cash payment made, and possession given on Saturday, June 11th, instant.

“11. It is agreed that all that portion of the sixth above clause or paragraph after the words ‘the parties of the first part’ shall be stricken out, and that the same is erased before the execution of this contract, and that the party of the second part assumes and promises to pay all said debts, liabilities and contracts, as the same may exist at the time he takes possession, whether the same appear on the books of the said firm of Douglass & Conner or not.

“12. And it is further agreed that the above sale to the said party of the second part shall embrace the interest of the parties of the first part in all assets of every kind belonging to said firm of Douglass & Conner, and appertaining to said partnership business, including so much of a certificate of sheriff’s sale, by the sheriff of Fayette county, Indiana, as represents a debt of about two thousand dollars of Lafayette Develin to said Douglass & Conner, but no further interest therein.

“If the premises shall be redeemed, that portion of the redemption money, with its accrued interest, shall go to the party of the second part.

“If not redeemed, the parties of the first part shall, at their option, pay to the party of the second part the amount of said Develin’s debt and interest, or convey by quitclaim deed a proportionate part of the property so bought at sheriff’s sale to the party of the second part.

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“Witness our hands and seals the day and year aforesaid.

“SAMUEL M. DOUGLASS.

“JAMES G. DOUGLASS.

“ALEX. H. CONNER.

“L. W. HASSELMAN.

Whether this agreement transfers to the vendees, as assets of the partnership, any interest of the vendors in the accounts due from them as partners to the firm, is the question upon which the decision of this case must depend.

We are of opinion that the private accounts against the Douglasses and Conner, in favor of the firm of Douglass & Conner, were not such partnership assets as would pass, by the agreement, to Hasselman. These accounts represented what had been drawn out of the firm by the partners, and not debts due to the firm. Hasselman bought the interest which the three partners had in the partnership assets at the time of the purchase, not the assets they had previously drawn out of the firm; and the more they had drawn out the less would be the interest which Hasselman would take by his purchase. Besides, only the creditor can sell a debt; the debtor has no interest in it which he can transfer. In these accounts, the Douglasses and Conner were the debtors; the firm of Douglass & Conner was the creditor. The firm sold nothing to Hasselman; it was a sale by the three partners of their undivided individual interests. They could not become their own creditors.

As to the other choses in action due the firm, they sold their right in them as creditors, not as debtors. Each one sold his interest in the firm, which would be the share remaining to him after the payment of the partnership debts and the final settlement of the partnership affairs. A partner has no transferable interest in the property of a partnership to which, after its ultimate adjustment, he is indebted.

The case of *Van Scoter v. Lefferts*, 11 Barb. 140, is in point. Lefferts and Smith were partners in selling goods, under the style of Smith & Lefferts. Lefferts sold all his interest in the partnership property and effects to Hartshorn,

who agreed to pay Leffert's proportion of the partnership debts due from the firm of Smith & Lefferts. Nothing was said at the time about any account on the books against Lefferts. Hartshorn subsequently discovered that there was an account against Lefferts upon the books of Smith & Lefferts, for goods taken by and charged to him, amounting to three hundred and one dollars. Smith subsequently transferred his interest in this book account to Hartshorn, and Hartshorn transferred it to Van Scoter, who thus became the owner of the entire account.

JOHNSON, J., who delivered the opinion of the court, says:

"It seems to me quite manifest that in no view of this case could the plaintiff" (Van Scoter) "recover the whole of this account. Hartshorn never had any interest in this account till Smith assigned him his interest. Hartshorn purchased only the interest the defendant" (Lefferts) "had in the firm at the time of the sale, and not that which he had previously drawn from it. It would be a legal absurdity to say that a person sold a debt against himself to another. The debtor has no interest in the debts against him, which he can transfer. The property and interest in a demand belongs wholly to the creditor, and the debtor has no authority or control over it.

"Assuming that this three hundred and one dollars had been taken from the joint stock, before the sale, what was then the state of the case as between the defendant and his partner Smith? If their interests were equal, the defendant would be liable to pay Smith just one-half the amount, and would be entitled to retain the other, he being joint owner of the property taken. Hence it follows that if Hartshorn was really deceived as to the existence of this account against the defendant for goods, the interest which he acquired by his purchase was just one hundred and fifty dollars and fifty cents less than what he expected or supposed it to be. He took what interest the defendant then had, and no more. For this amount the defendant may be liable in some other form of action, as for fraud in the sale, or upon a warranty as

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to the extent of his interest; but it is clear that no such interest was acquired by Hartshorn by his purchase. He took by that precisely the interests and rights which the defendant would have been entitled to on a settlement and adjustment of all the partnership matters between him and Smith at that time, and no other or greater."

The vendees, by virtue of the agreement, can make just the same settlement with the firm of Douglass & Conner as the vendors could have made if they had not made the sale.

In the case before us there is no warranty, and no fraud sufficiently alleged, not even an averment that the appellants, at the time of the sale, were ignorant of the facts now complained of. They bought certain interests, the amount of which was unascertained at the time, with a full knowledge of its uncertainty. We can perceive nothing in the record of which they have a right to complain. *Abey v. Bennett*, 10 Ind. 478; *Eakin v. Fenton*, 15 Ind. 59.

The judgment is affirmed.

DOWNEY, J.—I cannot concur in the conclusion reached by the majority of the court in this case, as stated in the foregoing opinion.

It is stated in the majority opinion, that the private accounts of the Douglasses and Conner, in favor of the firm of Douglass & Conner, were not such partnership assets as would pass by the agreement to Hasselman. The opinion then speaks of the accounts as assets they had drawn out of the firm, and not debts due to the firm, and states that Hasselman bought the interest the three partners had in the firm, and not what they had previously drawn out; that only the creditor can sell a debt, and that the debtor has no interest that he can sell, etc.

I do not understand the case to be as thus stated. The idea that the Douglasses and Conner, or any of them, had withdrawn the amounts in question from the capital stock of the company nowhere appears; but in every paragraph of the answer in question, the amounts are stated as so much due

from them to the firm, and constituting part of the assets of the firm, and I think it cannot be successfully denied that they were liable to the firm for every dollar that they thus owed it.

When Hasselman purchased the interests of three of the partners in the partnership property, he did not become the owner of any specific part of the property, but he did become the owner of whatever the ultimate balance due his assignors would have been on a full and final settlement and adjustment of the affairs of the firm; and in making this adjustment, each partner was liable and bound to pay to the joint concern the full amount in which he was indebted.

In speaking of the interest which would pass by a sale or assignment by one of the partners, in *Smith v. Evans*, 37 Ind. 526, this court said:

“That interest consisted not of one-third of the partnership property, but of one-third of whatever might be the ultimate balance, after payment of the partnership debts and the settlement of the accounts between the partners.”

The ultimate balance was what Hasselman purchased, and to ascertain and fix that balance the assigning partners were liable to account for the amounts which they respectively owed the firm. It is a misconception of the nature of the transaction to speak of it as a sale by a debtor of his own indebtedness. The indebtedness was to the firm, and Holloway, the owner of the share of the partnership property not sold, had an interest in it which it was not in the power of his co-partners to dispose of so as to affect his interests or the right of the firm to demand the payment of the same.

That Hasselman acquired an interest in all debts due the firm, is very clear from the language of the instrument by which the transaction was evidenced.

The second clause embraces not only all of the designated articles of property, but contains the further words, as follows: “and generally all property, of every name or kind or description, belonging or appertaining to said Journal

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office, or to said firm of Douglass & Conner, including the good-will of the daily and weekly Journal newspapers."

It would be difficult to use language more general and comprehensive than this.

The fourth clause embraces "all notes and book accounts belonging to the firm." There can be no doubt but that the appellant became the owner of the interest of his assignors in all choses in action due to the firm.

The practical construction placed upon the contract by the parties shows that this was their understanding of it, else why would James Douglass and Conner have paid the amounts which they acknowledged they owed the partnership, after the sale of their shares. If the sale of the shares of James Douglass and Conner to Hasselman operated, as supposed by the majority of the court, as an extinguishment of their debts to the firm, why did they, after the sale and assignment, pay the amounts which they admitted they owed the firm? Hasselman agreed to pay the debts of the firm, or, at least, purchased the assets subject to the debts, and he had a right to insist that the debts due to the firm, whether owed by the members or by third persons, should be paid, to make a fund out of which to pay its debts. As he was bound to pay the debts, he was entitled to collect, through the firm, the assets of the firm. He had a right to claim for the firm, from the Douglasses and Conner, the whole amount which they owed the joint concern; and if they did not pay it, they were liable to be sued by the firm for what was actually due from them.

If the affairs of the firm were yet unsettled, Hasselman could not now use this claim as a set-off or counter-claim in this action, but he would have to work out his claim through the firm. But the answers show that the debts of the firm are all paid, and that the Douglasses and Conner have paid to Holloway what was due him of these debts, which leaves no one except Hasselman having any interest in them. Under these circumstances, he can enforce the payment of them, to the extent of his interest in the assets of the firm, as

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perfectly and effectually as it could have been done in the name of the firm. *Briggs v. Daugherty*, 48 Ind. 247, and cases cited.

We see no objection to this growing out of the fact that the Douglasses and Conner owe different amounts. In the accounting, each can be made to account for what he owes, and the court can not only adjust the claims as between the appellant and them, but as between the Douglasses and Conner themselves.

The opinion of the majority of the court is based on the case in *Barbour*, which I think is not enough in point to be an authority which ought to control our decision in the case before us. It does not appear that in that case the assigning partner sold the notes, accounts and all property of every kind due the firm. Nor does it appear, in that case, that the partnership debts had been paid.

In my opinion, the judgment in this case should be reversed.

PETTIT, J., concurs in the dissenting opinion.

Petition for a rehearing overruled.

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SIMS ET AL., SCHOOL TRUSTEES, *v.* MCCLURE ET AL.

**PARTIES.**—*School Corporation.*—An action to recover for materials furnished and services rendered by the plaintiff in the erection of a school-house, under the employment of the school trustees of a city, should be brought, not against such trustees, but against the school corporation, by the name and style of "The School City of —," filling the blank with the name of the city.

From the Carroll Circuit Court.

*J. H. Gould*, for appellants.

*L. E. Reynolds*, for appellees.

BIDDLE, C. J.—The appellees sued the appellants, as

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153	283
52	267
155	208

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school trustees, for materials furnished and services rendered in building a school-house. The appellants claim that, as the employment by them of the appellees was as school trustees of the city of Delphi, for the purpose of building a public school-house, the school city should have been sued in its corporate capacity, and not the trustees by their individual names. In this, we think, they are right.

By the first section of the act of March 3d, 1859, 1 G. & H. 570, each township is made a body corporate by the name and style of "—— School Township of —— county," according to the name of the township and county in which it is organized. This section, as to the school corporation and its name, is not repealed by the act of March 6th, 1865, 3 Ind. Stat. 440, but by the fourth section of the last named act is approved, and also made applicable to incorporated towns and cities, as well as to civil townships.

In our opinion, the suit should have been brought against the school corporation, by the name and style of "The School City of Delphi." This question has been heretofore settled in the case of *Carmichael v. Lawrence*, 47 Ind. 554, followed in the cases of *McLaughlin v. Shelby Township, etc., ante*, p. 114, and *Morrison v. McFarland*, 51 Ind. 206.

The judgment is reversed, with costs; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

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### GOODWIN v. WALLS.

**ASSIGNMENT OF ERROR.**—On appeal to the Supreme Court, causes for a new trial cannot properly be assigned as errors.

**BILL OF PARTICULARS.**—*Motion to Make More Specific.*—Where, in a bill of particulars filed with a pleading, the account set out consisted of the fees of a district attorney in a number of cases, and the items were merely statements of the names of the parties in each case, with the amount of the fee carried out in figures, a motion of the adverse party to require the

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pleader to make such bill more specific, by giving the dates of the prosecutions and the courts in which they were prosecuted, it was held, presented a reasonable request, and should have been sustained.

**JUSTICE OF THE PEACE.—Jurisdiction.—Amendment on Appeal.**—Where, on an appeal from a justice of the peace to the circuit court, the parties had leave to amend their pleadings, and the plaintiff filed an amended complaint setting out a cause of action for an amount larger than that of which the justice had jurisdiction, he could not complain of an answer thereupon filed, because the claim of the defendant therein set out was for a larger amount than that of which the justice had jurisdiction.

**DEMURRER.—Reply.**—There is no error in sustaining a demurrer to a special paragraph of reply which puts in issue nothing not put in issue by a remaining paragraph of general denial.

From the Boone Circuit Court.

*G. H. Goodwin*, for appellant.

*W. B. Walls* and *J. Claybaugh*, for appellee.

**DOWNEY, J.**—Action by the appellant against the appellee, before a justice of the peace. The appellant was prosecuting attorney, and the appellee was his deputy. They had an agreement for dividing the fees taxed and collected, and the plaintiff alleged in his complaint that the defendant had in his hands two hundred dollars collected by him, due to the plaintiff, which he refused to pay over.

Before the justice of the peace, the defendant appears to have answered, and there was judgment against him in favor of the plaintiff, for twenty-five dollars.

In the circuit court, after a trial in which the jury failed to agree, the court granted leave to both parties to amend their pleadings. Accordingly, the plaintiff, at the next term, filed an amended complaint, in the sum of four hundred dollars, accompanied by a bill of particulars.

The defendant answered in three paragraphs:

1. A general denial.

2. That the plaintiff was elected and qualified district attorney for the twenty-fourth judicial district, etc., in the fall of 1872, said district being composed of the counties of Boone and Clinton, etc., and in October, 1872, appointed the defendant deputy prosecuting attorney for the county of

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Boone, in, etc., and agreed to pay defendant one-half of all the fees taxed before the justices' courts and common pleas and circuit court of said county, while the defendant was acting as plaintiff's deputy; and in July, 1873, the defendant resigned his appointment as such deputy, and the plaintiff received such resignation, and notified defendant, at the time, not to collect any of the fees taxed by any of said courts; and the defendant says that during the time he so acted as plaintiff's deputy, there were taxed in the several courts attorney's fees in favor of the plaintiff, for services rendered by the defendant for the plaintiff, amounting to six hundred dollars, a bill of particulars of which is filed, etc.

3. That when this action was commenced, the plaintiff was, and still is, indebted to him in the sum of six hundred dollars, upon an account, etc., and defendant offers to set off, etc., and demands judgment, etc. The account is the same as that filed under the second paragraph.

The plaintiff moved the court to reject the second and third paragraphs of the answer, for the following reasons:

"1. Because the said action was first brought and tried before a justice of the peace, and that said justice had no jurisdiction to try a cause in which so large an amount was involved as now appears from the said paragraphs.

"2. Because the said paragraphs were not pleaded before the justice.

"3. Because the said paragraphs are pleaded in violation of rule of this court.

"4. Because they, and each of them, are irrelevant and not pertinent to the issues in said cause."

The plaintiff also moved the court to require the defendant to make his bill of particulars more specific, by giving the dates of the said prosecutions and the courts in which they were prosecuted. These motions were overruled, and the plaintiff excepted. He then demurred, for want of facts, to the second and third paragraphs of the answer, and the demurrers were overruled, and he again excepted.

The plaintiff next replied to the answer:

1. A general denial.

2. That the defendant was to receive only one-half of the fees taxed and collected in cases before justices of the peace, and in no other cases; and the defendant's claim is for prosecutions in which there were no convictions, or cases in which fees were taxed but not collected; and that none of said claim is due to the defendant.

The defendant demurred to the second paragraph of the reply, for want of facts, his demurrer was sustained, and the plaintiff excepted.

The issues were tried by a jury, and there was a verdict for the defendant for twenty-five dollars. The plaintiff moved the court to grant him a new trial, which motion was overruled, and final judgment was rendered for the defendant, according to the verdict.

It is alleged that there are the following errors apparent in the record:

1. The finding of the court is contrary to evidence, and the judgment of the court is contrary to law.

2. The finding and judgment are contrary to law and evidence; the finding and judgment should have been for the plaintiff.

3. The court erred in overruling the motion of the plaintiff to grant a rule against the defendant to make his answer and bill of particulars more specific.

4. The court erred in overruling the plaintiff's motion to reject the second and third paragraphs of the defendant's answer.

5. The court erred in overruling the plaintiff's demurrer to the second and third paragraphs of the defendant's answer.

6. The court erred in sustaining the demurrer to the second paragraph of the plaintiff's reply.

7. The court erred in overruling the motion of the plaintiff for a new trial.

The first and second assignments of error are but reasons for a new trial, and as assignments of error present no question.

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Goodwin v. Walls.

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As to the third alleged error, it appears that the defendant's bill of particulars consists of the usual heading, and, following that, a statement of the names of the parties in each case, with the amount of the fee carried out in figures. The motion of the plaintiff was, that the defendant "make the bill of particulars more specific, by giving the dates of the said prosecutions and the courts in which they were prosecuted."

It seems to us that this was a reasonable request, and that the court should have made the order. The information was necessarily more in the power of the defendant than that of the plaintiff. It was but fair to the plaintiff that he should have such particulars as would enable him to make the inquiries about the cases that were requisite to enable him properly to meet the claims. 2 G. & H. 105, sec. 79; *Vest v. Weir*, 4 Blackf. 135, n. 1, and authorities cited.

With reference to the fourth alleged error, it seems to us that we must hold that the plaintiff, by filing a claim in the circuit court for four hundred dollars, an amount greater than that of which the justice of the peace had jurisdiction, must be regarded as thereby consenting to the enlargement of the amount of the claim of the defendant. The plaintiff cannot fairly claim to increase the amount of his demand to an amount beyond two hundred dollars, and at the same time insist that the defendant's demand shall be kept at or below two hundred dollars.

We do not see that there was any error in overruling the demurrers to the second and third paragraphs of the answer. They seem to us to be good answers.

There was no error in sustaining the demurrer to the second paragraph of the reply. It put in issue nothing which was not put in issue by the general denial.

The evidence is not in the record, and, therefore, we can decide nothing under the seventh alleged error.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion for a more specific bill of particulars, and for further proceedings.

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## LIPPRANT v. LIPPRANT.

SLANDER. — *Words. — Provincial Meaning.* — Words not slanderous *per se* spoken concerning a woman, which at the time and place have, when spoken of a woman, a provincial meaning imputing to her the keeping of a whore-house, and which are spoken in such provincial sense and are so understood by the persons to whom they are spoken, are actionable.

SAME. — *Evidence.* — On the trial of an action for slander, there was no error in refusing to permit the defendant to prove that, about the time of the commencement of said action, the plaintiff said she intended to bring suits against the defendant and prosecute the same until she broke him up.

EVIDENCE. — *Instruction Concerning.* — The failure of a court to instruct the jury as to the proper purpose for which evidence introduced has been admitted cannot render erroneous the admission of the evidence.

From the Newton Circuit Court.

*R. S. Dwiggin*s and *Z. Dwiggin*s, for appellant.

*E. L. Urmston*, *J. Healey*, *W. H. Martin* and *B. K. Elliott*, for appellee.

DOWNEY, J. — This was an action by the appellee against the appellant for slander, and there was judgment for the plaintiff. The complaint was in five paragraphs, a demurrer to the second and fifth of which was filed and overruled. The answer was in two paragraphs, the first of which was a general denial. The second was special, and to it a demurrer was sustained.

The trial was by jury. There was a verdict for the plaintiff; motions by the defendant for a new trial and in arrest of judgment were overruled, and there was final judgment for the plaintiff.

Several motions were made by the defendant to strike out sets of words in the complaint, one of which was sustained, and the others were overruled. This action of the court is assigned as error, but we do not think it involves the merits of the complaint.

The rulings of the court on the demurrers to the second and fifth paragraphs of the complaint are also assigned as errors. Looking to the evidence in the record, we think it

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clear that the case did not turn on the second paragraph of the complaint.

In the fifth paragraph, it is alleged that the defendant spoke of and concerning the plaintiff these words: "She" (meaning the plaintiff) "is living at Watters'" (meaning a citizen of said county) "and is keeping an accommodation-house." "She" (meaning the plaintiff) "is keeping an accommodation-house." It is averred that the words used, when spoken of a woman, had, at that time and place, a provincial meaning, that is, the keeping of a whore-house; that the defendant spoke the words in such provincial sense, and that they were so understood by the persons to whom they were spoken.

It seems to us that this paragraph of the complaint is sufficient. To charge a person with keeping a whore-house is actionable. Townshend Slander, 237. That is what the words import, according to their provincial meaning. This is on the ground that such a house is a common nuisance. *Wright v. Paige*, 36 Barb. 438; 2 G. & H. 288, sec. 628; 2 G. & H. 460, sec. 8.

Counsel urge that the paragraph is bad for want of prefatory allegations showing that the words were used in a slanderous sense, and we are referred to *Ward v. Colyhan*, 30 Ind. 395. We recognize the authority of that case, but it is not applicable here. In that case, there were no averments of prefatory matter showing the sense in which the words were used. Here there are such averments. We recognize the difference between mere innuendoes and averments essential to render words actionable which are not actionable *per se*. See *Shigley v. Snyder*, 45 Ind. 541, and cases there cited.

It is claimed that the court erred in sustaining the demurrer to the second paragraph of the answer. This paragraph is advocated on the ground that it was good in mitigation of damages. The words to which the paragraph relates were not proved, and hence this question is immaterial.

We will next consider the question as to the sufficiency of

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the evidence, a question made in the motion for a new trial, the overruling of which is assigned as error.

The action was commenced on the 5th day of September, 1873, by the filing of a complaint and the issuing of a summons thereon against the defendant. The action was commenced in Jasper county, and was numbered 589. On the 17th day of September, 1873, a demurrer to the complaint was sustained, and leave was granted to file an amended complaint. On the 24th day of September, 1873, an amended complaint was filed. On the 26th day of September, 1873, leave was asked by the plaintiff to file a supplemental complaint, which was denied. On the 8th day of November, 1873, in vacation, the plaintiff filed another complaint, numbered 604, on which the clerk issued another summons. On the 3d day of December, 1873, the court ordered that the two actions, by their numbers, be consolidated, and that the plaintiff file an amended complaint, embracing the causes of action in both complaints; and on the 4th day of December, 1873, the amended complaint was filed.

It might, probably, have been made a question whether these entries show the existence, at any time, of two actions. But counsel make no such question, and we need not do so. The question as to when the action was commenced becomes material, on account of the date at which the words were spoken. There is nothing in the record to show what was contained in the complaint, or amended complaint, numbered 589, or in the complaint numbered 604. Proof of the speaking of words after an action has been commenced, whatever other uses may be made of them, cannot sustain the action.

A witness testified that, about the 15th day of September, 1873, the defendant said to him, when inquired of as to what the plaintiff was doing, that "she was living in a house on the Remington road, near the end of a certain willow hedge, and he guessed she was keeping an accommodation-house." The date given here was after the commencement of the first

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action, conceding that there were two actions, but before the commencement of the second. It is probable that these words were not in the complaint numbered 589, and that this was the reason why it was sought to file a supplemental complaint, and why the complaint numbered 604 was filed. We may assume, in support of the judgment, that this was so, and in this way, so far as this part is concerned, and as error must be shown by the appellant, and cannot be presumed, sustain the action of the circuit court.

Counsel contend that it is not shown by the evidence that the words used have the provincial meaning alleged in the complaint. Several witnesses testify on the subject, some one way and some the other. John M. Austin, to whom the words were spoken, testified, in the first place, that the words, when applied to a woman, had no local meaning in the town of Rensselaer or vicinity; that they meant the same there as anywhere else; that he kept an accommodation-house himself, being a hotel keeper. Subsequently, being recalled, he testified that "the phrase 'is keeping an accommodation-house,' when applied to a woman, in Jasper county, in his opinion, mean the same as a house of ill-fame, or house of prostitution." On cross-examination, he said, "the phrase 'is keeping an accommodation-house,' when applied to a woman, means the same in Jasper county as it would in Newton county, or anywhere else. I do not think it means anything different in Jasper county than it does anywhere else. I am only giving my personal opinion about it."

It is averred in the complaint, that the party to whom the words were spoken understood them in their alleged provincial sense or meaning. It does not appear that any other person than the witness, Austin, was present, or heard the words spoken. Does this evidence sustain the complaint? We think it does.

The court admitted evidence of the speaking of words not in the complaint, after the commencement of the action, to show malice in the speaking of the words alleged in the com-

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plaint to have been spoken. Counsel for the appellant concede that this was correct, but urge that the court did not properly instruct the jury as to the purpose for which the evidence was admitted. The act of the court in admitting the evidence is one thing, and any instruction necessary to guide the jury in its consideration is quite another. The court committed no error in admitting the evidence, and gave no erroneous instruction with reference to it. If it was supposed by the defendant that any additional instructions were necessary to enable the jury to properly consider and apply the evidence, such further instructions should have been asked by him, and, if they were not given, a question upon the ruling might have been reserved. We see no error in this action of the court.

The defendant offered to prove that the plaintiff said, about the time of the commencement of this suit, that she intended to bring suits against said defendant and prosecute the same until she broke him up; which evidence the court refused to admit.

We do not see that there was any error in this ruling. The offered evidence did not tend to show that the words were or were not spoken by the defendant; nor did it tend to affect in any way the amount of the damages.

In *Patterson v. Hutchinson*, 30 Ind. 38, which was an action for slander, the venue had been changed, and the plaintiff was allowed, over the objection of the defendant, to prove that he wanted to change the venue because he wanted the plaintiff to have some trouble, "as well as him all." It was held by this court that it was error to admit the evidence, as nothing that was said could have the effect to increase the damages, or to show with what mind the words charged were spoken.

The judgment is affirmed, with costs.

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The State v. Buckner.

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## THE STATE v. BUCKNER.

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**LIQUOR LAW.—***Indictment.*—Indictment under the act of March 17th, 1875, for selling intoxicating liquor in a less quantity than a quart, the defendant “not then and there being licensed, according to the laws of Indiana in force at the time, to sell intoxicating liquor at retail.”

*Held*, on motion to quash, that such allegation of the defendant’s not having procured a license, though not in the words of the statute, was sufficient.

From the Morgan Circuit Court.

*C. A. Buskirk*, Attorney General, and *A. M. Cunning*, Prosecuting Attorney, for the State.

*G. W. Grubbs*, *M. H. Parks* and *J. H. Jordan*, for appellee.

**BIDDLE, C. J.**—Indictment against the appellee for selling intoxicating liquor in a less quantity than a quart. The charging part of the indictment is as follows:

“That, at said county of Morgan, on the 1st day of August, 1875, one Thomas J. Buckner did then and there unlawfully sell intoxicating liquor, in a less quantity than a quart at a time, to wit, the quantity of one gill, at and for the price of ten cents, to one Eugene Buntel; the said Buckner not then and there being licensed, according to the laws of Indiana in force at the time, to sell intoxicating liquor at retail; contrary,” etc.

On motion of the appellee, the court quashed the indictment. The State excepted, and appealed. It is urged by the appellee, that the allegation in the indictment that the sale was made without a license is insufficient. The indictment is founded on the act of March 17th, 1875, Acts Spec. Ses. 1875, 55, the first section of which is as follows:

“That it shall be unlawful for any person or persons to directly or indirectly sell, barter or give away for any purpose of gain, any spiritous, vinous or malt liquors, in less quantities than a quart at a time, without first procuring, from the board of commissioners of the county in which such

McLaughlin v. The State.

liquor or liquors are to be sold, a license as hereinafter provided," etc.

The method of procuring such license is prescribed in sections 3 and 4 of the same act.

The words of negation in the indictment do not literally follow the statute, but "words used in the statute to define a public offence need not be strictly pursued, but other words, conveying the same meaning, may be used." Sec. 59, 2 G. & H. 403. See, also, secs. 54, 60, 61, 2 G. & H. 400-403. Besides, the averment in this case is one of negation, which the State need not to prove.

According to these sections, as they have been interpreted by our own decisions, and the analogy of similar statutes and decisions in other states, the indictment is sufficient. *Reed v. The State*, 8 Ind. 200; *Whitney v. The State*, 10 Ind. 404; *Reams v. The State*, 23 Ind. 111; *McCool v. The State*, 23 Ind. 127; *Shafer v. The State*, 26 Ind. 191; *Commonwealth v. Wilson*, 11 Cushing, 412; *Commonwealth v. Murphy*, 2 Gray, 510; *Commonwealth v. Pray*, 13 Pick. 359; *Commonwealth v. Leonard*, 8 Met. 529; *Commonwealth v. Dow*, 12 Gray, 133; *Commonwealth v. Boyle*, 14 Gray, 3; *Martin v. The State*, 6 Humph. 204.

The judgment is reversed; cause remanded, with instructions to overrule the motion to quash the indictment.

MCLAUGHLIN v. THE STATE.

**CRIMINAL LAW.—Assault and Battery.—Name.**—In a prosecution for an assault and battery, the name of the injured person is a part of the description of the offence, and must be strictly proved as charged.

From the Henry Circuit Court.

*J. Brown* and *J. M. Brown*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

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BIDDLE, C. J.—Prosecution for an assault and battery, by affidavit and information. Motion to quash the information overruled; exception. Plea not guilty; trial by the court; finding guilty; fine; motion for a new trial overruled; exception; appeal.

The affidavit charges, in the proper form, that Raleigh McGloffin committed an assault and battery on the person of Eliza Welborn. The information alleges that Raleigh McLaughlin committed an assault and battery on the person of J. Eliza Welborn.

According to section 25, p. 395, 2 G. & H., “an information may be amended in matter of substance, or form, at any time before the defendant pleads, without leave; and at any time after the defendant pleads, with leave of the court.”

On motion, the court below would, doubtless, have granted leave to amend the information to make it correspond with the affidavit. But, as the case must be reversed on another point, the insufficiency of the evidence, and as the information may be amended to correspond with the affidavit, we do not decide the question on the motion to quash. *Miles v. The State*, 5 Ind. 215; *The State v. Wise*, 7 Ind. 645; *Mount v. The State*, 7 Ind. 654.

There is no evidence showing that the appellee committed an assault and battery on the person of Eliza Welborn. There is evidence tending to show that he committed such an offence on Mrs. Welborn; but this may mean one Mrs. Welborn as well as another. The name of the injured party is a part of the description of the offence, and must be strictly proved, or no safe conviction can follow. This is probably a mere omission, but it is a defect fatal to the case.

The judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and to grant leave to amend the information.

ARNOLD v. THE STATE.

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CRIMINAL LAW.—*Robbery.*—*Description of Money.*—An indictment for robbery, the property alleged to have been taken being bank notes, or bills, or United States treasury notes, or bills, which, in describing such notes, or bills, does not state their denominations by the use of the word denomination or equivalent words, is bad on motion to quash.

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From the Shelby Circuit Court.

*K. M. Hord, A. Blair, B. F. Love and W. Z. Conner*, for appellant.

*C. A. Buskirk*, Attorney General, and *W. S. Ray*, Prosecuting Attorney, for the State.

BUSKIRK, J.—The appellant was convicted of robbery. The errors assigned are, that the court erred in overruling motions to quash the indictment and for a new trial.

The objection urged against the indictment is, that it does not contain a proper and sufficient description of the property alleged to have been taken. The charging part of the indictment is, “that one John Ripley Arnold, late of said county, on the 23d day of November, A. D. 1874, at said county and State aforesaid, did then and there unlawfully, forcibly and feloniously take from the person of one George F. Stark, by violence and by putting him in fear, one national bank note of the value of five dollars, one national bank note or bill of the value of ten dollars, and three United States treasury notes or bills, of the kind or character known as ‘greenbacks,’ and of the value of one dollar each, and all being of the aggregate value of eighteen dollars, and all being of the personal goods and chattels of George F. Stark.”

Robbery is defined to be larceny committed by violence from the person of one put in fear. 2 Bishop Cr. Law, 5th edition, section 1156; *Hickey v. The State*, 23 Ind. 21; *Bonsall v. The State*, 35 Ind. 460; Bicknell Cr. Pr. 321, *et seq.* No more particularity in describing the property is required than in an indictment for larceny. *Terry v. The*

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Arnold v. The State.

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*State*, 13 Ind. 70; *Brennon v. The State*, 25 Ind. 403. The particular objection urged to the indictment is, that it does not give the denomination of the bills alleged to have been taken.

In *Daily v. The State*, 10 Ind. 536, the property was described as "two United States gold coins of the denomination and value of ten dollars, ten United States gold coins of the denomination and value of five dollars, and ten United States gold coins of the denomination and value of two dollars and fifty cents each,—altogether of the aggregate value of eighty-five dollars," and it was held sufficient, upon the ground that the court and jury knew that a United States gold coin of the denomination and value of ten dollars is an eagle.

In *McKane v. The State*, 11 Ind. 195, the property was described as sixty dollars of the current gold coin of the United States of the value of sixty dollars, and it was held sufficient. This ruling is in conflict with the one last cited.

In *Terry v. The State*, *supra*, the indictment was held good which described the property as "one pocket-book of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin, of American coinage, of the value of five dollars." But in *Hickey v. The State*, *supra*, and *Brennon v. The State*, *supra*, the denomination and value of the bills alleged to have been stolen are given, and it was held that the description was sufficient.

In *Terry v. The State*, *supra*, the motion to quash was properly overruled, because the pocket-book was correctly described. See *Engleman v. The State*, 2 Ind. 91; *Crawford v. The State*, 2 Ind. 132. The precise point made here does not appear to have been squarely made and decided in this State, but it has been made and decided in other States.

In *The State v. Longbottoms*, 11 Humph. 39, the indictment for larceny charged the defendant with having stolen "ten dollars, good and lawful money of the State of Tennessee," and it was held that this was not a sufficient descrip-

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tion of the thing stolen. Money should be described as so many pieces of current gold or silver coin, and the coin must be stated by its appropriate name.

In *The People v. Ball*, 14 Cal. 101, it was held that an indictment for larceny describing the money as "three thousand dollars, lawful money of the United States," was insufficient. It was said: "In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts. 'The species of coin must be specified.' Arch. Cr. Pl. 61; Whart. Cr. Law, 132."

In *The People v. Jackson*, 8 Barb. 637, it was held that in an indictment for stealing bank notes, it is sufficient to describe them in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels; that the property stolen must be described with certainty to a common intent. By which is to be understood such certainty as will enable the jury to say whether the chattel proved to have been stolen is the same with that upon which the indictment is founded, and as will show judicially to the court that it could have been the subject of the offence charged.

In *Rhodus v. Commonwealth*, 2 Duvall, 159, the indictment charged that the defendants took and carried away "one lot of treasury notes, called greenbacks, the issue of the treasury of the United States of America, and one lot of Kentucky bank notes, and fifteen dollars in gold coin," and it was held insufficient. The court say:

"On the subject of indictments our criminal code recognized and established the modern common law, rightly understood and rationally applied. It dispenses with form and requires substance only. And what is now substance at common law is substance under the code—and, that is, every fact necessary to constitute the specific crime charged—alleged with only such precision as:

"1. To enable the court to see that, admitting the facts, it

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Arnold v. The State.

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has jurisdiction, and that the imputed crime has been committed by the accused.

“2. To enable the accused to understand the precise charge, and, without surprise, to prepare for defence against the proof which may be admissible to sustain that specific charge; and,

“3. To make the verdict and judgment certainly available as a bar to any subsequent prosecution for the same criminal act.

“According to this test, the indictment in this case seems to us insufficient to authorize conviction.

“‘One lot of treasury notes,’ without any specification of denomination, number, or value, is too indefinite for the identification of the thing taken, or of any part of it; and ‘one lot of Kentucky bank notes,’ without even a specification of the bank, is still more indefinite.

“Neither of these charges sufficiently notified the accused of the facts to be proved; and a conviction on either of them might not be availably pleaded in bar of another more specific indictment for the same offence. A minute description of all the treasury and bank notes might be impossible, and, therefore, is not required. But a nearer approach to it than this indictment makes, may be presumed to have been easy, and ought to be required. A specification of even one of the notes in each lot, so as to identify it, might be sufficient to answer the ends of the test just defined.

“Nor can ‘fifteen dollars in gold coin,’ without any specification of the number of pieces, or of the character or identity of the coin, or of any portion of it, be deemed sufficient for all the purposes of the law.

“As might be expected, there is some diversity on this subject in several of the state courts. But principle, analogy, and preponderating authority, incline decidedly in favor of our conclusion. As some confirmation of this, see Archbold’s Notes, pages 353–4–5–6.”

In *Wilson v. The State*, 1 Port. 118, it was held that an indictment for stealing promissory notes should state the

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Arnold v. The State.

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value and the amount of the notes alleged to have been stolen.

In *The State v. Williams*, 19 Ala. 15, it was held that an indictment for larceny of bank notes should state their number, denomination and value.

In *Salisbury v. The State*, 6 Conn. 101, the property was described as "thirteen bills against the Hartford bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this State;" and such description was held sufficient.

In *Hamblett v. The State*, 18 N. H. 384, it was held that an indictment for the larceny of bank notes should contain the number and value of the bills alleged to have been stolen.

In *Fredrick v. The State*, 3 W. Va. 695, the property was described as "four legal tender notes of the United States of America, each one thereof for the payment of and of the value of ten dollars, each current of the United States, and amounting to the sum of forty dollars; also one national currency note on the First National Bank of Newport, for the payment of and of the value of ten dollars, amounting in the aggregate to the sum of fifty dollars," and the description was held sufficient.

In *United States v. Barry*, 4 Cranch C. C. 606, it was held that an indictment for the larceny of a bank note must state the amount as well as the value.

In *United States v. McDaniel*, 4 Cranch C. C. 721, the property alleged to have been stolen was described as "a bank note of the Union Bank of Georgetown, to the amount of ten dollars, of the value of ten dollars," was sufficient, without the averment that it was "for the payment of money to the amount of ten dollars." See *Regina v. Bond*, 1 Denison C. C. 519, for the proper description of gold coin.

We do not think it is necessary, in an indictment for the larceny or robbery of bank notes, to state the numbers upon the bills, but the number of the bills stolen, with their denomination and value, should be stated.

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Dolman v. Studebaker.

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The indictment in the case in judgment should have been quashed for its failure to state the denominations (or the equivalent words, for the payment of a certain sum of money) of the bills alleged to have been taken.

The judgment is reversed; and the clerk will immediately notify the sheriff of Shelby county.

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DOLMAN v. STUDEBAKER.

CONTRACT.—*Assent of Both Parties.*—To make a contract, the parties must agree upon and assent to the same stipulations.

DAMAGES.—*Measure of for Refusal to Take Property Purchased.*—It seems that where a person agrees to make a purchase of property, and then refuses to proceed in the purchase and take the property, the loss of the bargain constitutes the proper measure of damages, and not the price of the property, the title of which has not passed.

From the St. Joseph Circuit Court.

*J. H. Baker, J. A. S. Mitchell and Baker, Hord & Hendricks*, for appellant.

*A. Anderson, L. Hubbard and W. G. George*, for appellee.

DOWNEY, J.—This was an action by the appellant against the appellee. The complaint alleges, in substance, that the parties entered into a contract, by which the defendant agreed to convey to the plaintiff a certain farm in Knox county for certain stock in the Knoblock Bros. Manufacturing Company, at South Bend, and certain payments in money in addition thereto, alleges that the defendant failed and refused to convey the land, and seeks to recover the price of the stock. The answer was a general denial.

Upon a trial by the court, there was a special finding, containing the following facts and conclusion of law:

1. That on the 3d day of February, 1873, and from that time to the present the plaintiff was, and still is, the owner

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Dolman v. Studebaker.

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of one hundred and ten shares of the capital stock of the Knoblock Brothers Manufacturing Company, a corporation located at South Bend, Indiana, said shares being fifty dollars each.

2. That, on the same day, the defendant owned one hundred and eighty-four acres of land in Knox county, Indiana, near Vincennes, known as the "Deardoff farm," and that the defendant continued to own said land until the 26th day of March, 1873; and at that date the defendant did, and still does, reside at South Bend, Indiana; and that the plaintiff, at said time, resided at Indianapolis, though his family were at Columbus, Ohio, and the plaintiff had made arrangements so that letters directed to him at Columbus should be forwarded to him at Indianapolis.

3. That on the 3d day of February, 1873, the defendant wrote to the plaintiff the following letter:

"SOUTH BEND, IND., February 3d, 1873.

"Mr. Dolman: Sir—How would you like to trade your stock in the K. B. M'f'g Co. for a good farm in this State? If you desire to make a trade, I will give you a good trade.

"Yours truly,

"C. STUDEBAKER."

That, on the 6th day of February, 1873, the plaintiff wrote and addressed to the defendant the following letter:

"INDIANAPOLIS, IND., February 6th, 1873.

"Mr. Clem Studebaker: Sir—Your note of the 3d inst. was forwarded to me, reaching me this day. I would trade my stock mentioned for real estate; and if you will send me description of the farm, giving me necessary particulars, I will investigate the matter and let you know. State your best terms, as if you meant business. Direct to me at," etc.

"JOHN H. DOLMAN."

On the 10th of February, 1873, the defendant wrote and addressed to the plaintiff the following letter:

"SOUTH BEND, February 10th, 1873.

"John H. Dolman, Esq.:" etc. \* \* \* "The farm I referred to is in Knox county," etc. "There is about forty

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Dolman v. Studebaker.

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acres in clover, and, I believe, fifty acres in wheat, which I get a share of, which I will let go with the farm," etc. "I will trade you the farm at eight thousand five hundred dollars, and take your stock at one dollar and twenty cents on the dollar," etc. "If you have any notion of trading, I would be glad to hear from you again.

"Yours truly,

"C. STUDEBAKER."

On the 12th day of February, 1873, the plaintiff replied to the defendant as follows:

"INDIANAPOLIS, February 12th, 1873.

"Mr. C. Studebaker: Dear Sir—I have just received your letter in relation to the farm in Knox county. I am favorably inclined to trade, and if you will send me a description," etc., "I will see about it," etc.

"Yours, etc.,

"JOHN H. DOLMAN."

On the 15th day of February, 1873, the defendant wrote the plaintiff as follows:

"SOUTH BEND, IND., February 15th, 1873.

"John H. Dolman, Esq.:" etc. "Yours of the 12th inst. is at hand," etc. After giving desired information, the writer says: "I will hold the offer subject to your acceptance till the 25th of this month.

"Yours truly,

"C. STUDEBAKER."

On the 24th of February, the plaintiff wrote the defendant as follows:

"INDIANAPOLIS, IND., February 24th, 1873.

"Mr. C. Studebaker: Dear Sir—I have just returned from Vincennes, where I looked at your farm, and liked it very much. I am willing to give eight thousand dollars, giving in payment my stock in the K. B. M. Co., at one dollar and twenty cents, and the balance in two equal payments of one and two years, with interest," etc.

"Yours, etc.,

"JOHN H. DOLMAN."

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On the 26th day of February, 1873, the defendant wrote the plaintiff as follows:

“SOUTH BEND, February 26th, 1873.

“John H. Dolman,” etc.—“Yours of the 24th at hand. I cannot accept your proposition. I have an offer of all cash down for the farm, but do not think I will accept it. I am going down there next week, and will see you on my way down or on my return,” etc.

“Yours truly,

“C. STUDEBAKER.”

4. That, on the 5th day of March, 1873, the defendant went through Indianapolis, on his way to Vincennes, and then had a conversation, at Indianapolis, with the plaintiff, in regard to the trade mentioned in the foregoing letters, and it was then agreed between them that if they should thereafter trade, the difference between the value of the land and the stock should be paid by the plaintiff to the defendant in one and two years, with interest; and it was then understood by both of them that the land was not worth eight thousand dollars in cash, nor the stock worth one dollar and twenty cents on the dollar; that Studebaker then went on to Vincennes, and made a contract for the sale of the land to another person, and so informed Dolman in a day or two afterwards, and thereupon the pending negotiations for the trade mentioned in said letters were broken off.

5. That afterwards, on the 15th day of March, 1873, the defendant wrote to the plaintiff the following letter:

“SOUTH BEND, IND., March 15th, 1873.

“John H. Dolman,” etc.—“There is a likelihood of my trade in the farm falling through. Do you want to make the trade we talked of, provided it does? \* \* Let me know whether you want to trade on my offer.

“Yours in haste,

“C. STUDEBAKER.”

On the 20th day of March, 1873, the plaintiff wrote to the defendant as follows:

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"COLUMBUS, OHIO, March 20th, 1873.

"Mr. C. Studebaker," etc.— \* \* \* \* "As I am just about concluding a trade for my stock, I will say now that I will trade with you at your offer, if I can know soon. So answer me here by telegraph, on receipt of this.

"Yours very truly,

"JOHN H. DOLMAN."

That, on the 26th day of March, 1873, the defendant, in reply to said letter of March 20th, sent the plaintiff the following telegram:

"To John H. Dolman, Spencer House: You can have the farm at first proposition with you.

"CLEM STUDEBAKER."

That, on the 25th day of March, 1873, the plaintiff had written to the defendant the following letter, which was not received till after the transmission of the telegram of March 26th:

"INDIANAPOLIS, IND., March 25th, 1873.

"Mr. C. Studebaker," etc.—"I wrote you from Columbus, in answer to yours of the 15th instant, saying I would trade at your offer for the farm, and asking you to answer by telegraph. I have not heard from you yet. How is it? Let me know as soon as possible. Direct here, care of the Spencer House," etc.

"Yours, etc.,

"JOHN H. DOLMAN."

6. That on the 26th day of March, and about an hour subsequent to sending the telegram aforesaid, the defendant was informed by his agent in Vincennes that he had sold the farm for seven thousand dollars; and that, in fact, the farm had been sold by the agent before the telegram aforesaid was sent, but the fact was then unknown to the defendant; that about that time the defendant became very sick and was unable to attend to any business; that about the 1st of April, 1873, he procured George Milburn to write a letter for him to the plaintiff, informing him that the defendant's agent had sold the land, but this letter was

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never received by the plaintiff. On the 5th day of April, 1873, the plaintiff wrote to the defendant the following letter:

"INDIANAPOLIS, IND., April 5th, 1873.

"Mr. C. Studebaker," etc.

"I am patiently waiting to hear from you in relation to the farm. I received your telegram saying I could have the farm, and that you would write me. I had accepted the proposition in my previous letter to you. I am now waiting for the papers. I suppose I will have to make arrangements for seeding a portion of the place this spring, and it is about time to begin. Let me hear from you as soon as you can possibly. Yours, etc.,

"JOHN H. DOLMAN."

That on the 8th day of April, 1873, one John H. Harper wrote to plaintiff the following letter:

"April 8th.

"John H. Dolman," etc.

"Your favor of the 5th is at hand, and in reply will say that Mr. C. Studebaker was taken down with a severe illness last Sunday, and has not been able to do any business since. We are, however, of the opinion the farm is sold to another party. As soon as he is able to be talked to we will advise you.

"STUDEBAKER BROS. MAN'F'G CO., HARPER."

On the 14th day of May, 1873, the plaintiff wrote to the defendant the following letter:

"INDIANAPOLIS, IND., May 14th, 1873.

"Mr. C. Studebaker," etc.

"I was pained to hear of your severe illness," etc. "I am anxiously waiting to close up our trade for the farm at Vincennes, and hope, if you are able, that you will give the matter your early attention," etc.

"Yours, etc.

JOHN H. DOLMAN."

On the 21st day of May, 1873, the defendant wrote to the plaintiff that the farm had been sold to another party. The defendant refused to convey the farm to the plaintiff, or

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accept the stock. The defendant was guilty of no fraudulent conduct, but refused to convey the land or accept the stock because of the sale of the land made by his agent prior to his sending said telegram to the plaintiff; that from the 26th day of March to the 21st day of May, said stock was worth the sum of five thousand dollars, and the farm was worth seven thousand dollars; that prior to the 3d day of February, 1873, plaintiff gave authority, commonly known as a proxy, to Merritt H. Baker, authorizing him to attend meetings of the Knoblock Brothers Manufacturing Co., and vote his stock, and that on the 20th day of April, 1873, Baker did attend a meeting of the stockholders of the company, and take part therein; that on or about the 22d day of November, 1873, plaintiff did revoke and annul said written authority; that prior to the 21st day of November, 1873, plaintiff placed the certificates for all of his stock in said company in the hands of Baker and Mitchell, of Goshen, assigned in blank, and did empower them to transfer and assign said stock to defendant, and on the 21st day of November, 1873, they, as agents of plaintiff, acting under said authority, made a tender of the stock to the defendant, and offered to deliver and assign said certificates to him and to comply with the contract, and that the defendant refused to accept the stock or certificates, and always has and still does refuse to accept the same, and denied that there was any contract; that on the trial of the cause the plaintiff continued the tender of the stock, but the same had not been assigned on the books of the company. The certificates of stock are set out in the special finding. It was further found that the plaintiff had not tendered the balance of one thousand nine hundred dollars, which would be due to the defendant, or offered to execute any obligation therefor on any terms.

“As a conclusion of law on the foregoing facts, the court finds that there was no contract made between the plaintiff and defendant as stated in the complaint.” Judgment accordingly.

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There was an exception to the conclusion of law, and it is assigned as error.

It is not disputed that, to make a contract, the parties must agree upon and assent to the same stipulations. It will not do for one of them to propose one thing, and the other to propose something else. The minds of the parties must meet and agree upon the same thing. Because it did not appear that this had occurred, the circuit court found that there was no contract.

We are also of this opinion. The proposition made by the defendant in his letter of February 10th, 1873, was not agreed to by the plaintiff in his letter of February 24th, 1873. On the contrary, he proposes to put the price of the land at eight thousand dollars, instead of eight thousand five hundred dollars, and proposes to pay the difference between the price of the stock and that of the farm in two equal payments of one and two years, instead of paying it in hand, as was to be understood from the proposition of the defendant. On receipt of this letter, the proposition of the defendant in his letter of February 10th was wholly withdrawn by his letter dated February 26th.

On the 5th of March, 1873, at Indianapolis, the parties met and had a conversation about the terms of the trade should they renew their negotiations, in which event it was agreed that the difference between the price of the farm and that of the stock should be paid in one and two years, with interest. It was also agreed that both the farm and the stock were estimated above their real value in the negotiations of the parties.

In renewing their correspondence, the defendant, in his letter of March 15th, 1873, asks the question: "Do you want to make the trade we talked of?" What proposition was alluded to here? The parties had never agreed upon the price of the land. The defendant had asked eight thousand five hundred dollars, and the plaintiff had offered eight thousand dollars. They had not differed as to the price of the stock.

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They had orally agreed as to the time of payment of the difference between the price of the land and that of the stock. If "the trade we talked of" is to be understood as that proposed in the letter from the defendant to the plaintiff of February 10th, as modified by the conversation at Indianapolis, which we think is the proper understanding of it, still it was not accepted by the plaintiff. He wrote, in his letter of March 20th: "I will trade with you, at your offer, if I can know soon." To this letter the defendant responded by a telegram of the 26th of March. In this he does not agree to the trade "talked of," but says: "You can have the farm at first proposition." He indicates that he had also written to the plaintiff. This letter, if one was written, is not in the record. By this telegram it is quite clear, we think, that the defendant goes back to the proposition made in his letter of February 10th, and renews it, unchanged by the oral modifications in the conversation at Indianapolis. This proposition the plaintiff never accepted. In his subsequent letters he claims that he had accepted some former offer of the defendant in his letter of the 20th of March; but this is not true, as we have already seen.

We do not decide that the contract could have been valid partly in writing and partly by parol, if the parties had agreed. What we decide is that they never agreed.

The theory of the plaintiff, that when the defendant refused to convey the land and to accept the stock, he became liable for the full price of the stock as mentioned in the negotiations between the parties, cannot, probably, be maintained, even if a valid contract were shown. The title to the stock never passed, and hence it is probable that all the plaintiff could recover would, in such case, be the damage sustained by him in consequence of the defendant's failure to comply with the contract.

It seems to be the rule that where a party agrees to make a purchase of property, and then refuses to proceed in the purchase and take the property, the loss of the bargain constitutes the proper rule of damages, because the property

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never passed. See *The P., C. & St. L. R. W. Co. v. Heck*, 50 Ind. 303, and *Porter v. Travis*, 40 Ind. 556, and cases cited.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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GRIFFIN v. MOORE.

**PLEADING.—Counter-Claim.—Injury to Property in Possession of Bailee.**—In an action against the keeper of a livery and feed stable, who had been employed by the plaintiff to keep, feed and take care of his horse, to recover for an injury to said horse, occasioned by said bailee's failure to take proper care of him, the defendant may set up, by way of counter-claim, an indebtedness of the plaintiff to the defendant for the keeping and taking care of said horse under said contract.

From the Boone Circuit Court.

*J. E. McDonald* and *J. M. Butler*, for appellant.

*R. W. Harrison* and *T. J. Terhune*, for appellee.

PETTIT, J.—The appellant, Washington Griffin, sued the appellee, Marcus C. Moore. The complaint was in two paragraphs, the substance of which is, that the plaintiff was the owner of a horse of the value of two hundred dollars, and that he hired the defendant, who was a livery and feed stable keeper, to keep, feed and take care of said horse; and that, by his carelessness, negligence, wilfulness and maliciousness, said horse had a leg broken, and was rendered of no value.

The answer was in two paragraphs:

1. General denial.

2. Called a counter-claim, setting up that the plaintiff is indebted to the defendant in the sum of two hundred dollars, growing out of the bailment of said horse, and the same contract and transaction, for the keeping, care, etc., of said horse.

To the second paragraph of the answer there was a demur-

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rer, for want of sufficient facts, overruled, and we hold correctly. The only objection to this ruling is, that the complaint is for a tort, and not founded on contract. This objection is wholly untenable, though unnecessary and surplus words, as to the carelessness, maliciousness and wilfulness of the defendant, are used in the complaint.

There was a trial by jury, and verdict for the defendant for twelve dollars. Motion for a new trial for these causes:

1. "The verdict of the jury is contrary to law."
2. "The verdict of the jury is not sustained by sufficient evidence, and is contrary to law."

The causes for a new trial do not allege or show that the damages are excessive, and the evidence, both of the plaintiff and defendant, shows that the horse was kept, fed and stabled by the defendant for the plaintiff, without showing the precise or actual time, yet the defendant swears for "weeks," and that the plaintiff was indebted for the keeping.

We cannot say that the verdict is not sustained by sufficient evidence, or that it is contrary to law.

The judgment is affirmed, at the costs of the appellant.

WORDEN, J.—I think if the first paragraph of the complaint be conceded to be in contract, still the second clearly sounds in tort, and therefore the counter-claim could not be pleaded to both paragraphs.

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ROGERS ET AL. v. THE LAFAYETTE AGRICULTURAL  
WORKS ET AL.

INJUNCTION.—*Corporation.*—An injunction will not lie to prevent the board of directors of a corporation from merely allowing as correct a fraudulent account against the corporation.

DEMURRER.—*Capacity to Sue.*—The question of the want of capacity of the

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plaintiff to sue cannot be raised under a demurrer to the complaint for its failure to state sufficient facts to constitute a cause of action.

**SAME.**—*Sufficiency of Facts.*—If the plaintiff be entitled, under the facts stated in his complaint, to any relief, whether injunctive or in some other form, against any defendant, a demurrer to the complaint, for want of sufficient facts, filed by such defendant, should be overruled.

**CORPORATION.**—*Action of Stockholders for Relief from Wrongful Acts of President.*—An action will lie in favor of a stockholder of a corporation for relief against the wrongful acts of the president thereof, when it is shown that a large per cent. of profits on the capital stock has been made by the corporation, and that the president will not allow the books of the corporation to be made to show the same; that the president is largely indebted to the corporation for the use of its property for his individual purposes and profit; that he has received all the emoluments of the corporation, and has not accounted therefor; that the majority of the directors are under his influence and control, and are instruments to do his bidding, and have abdicated their proper functions and surrendered the entire control of the affairs of the corporation to him; and such plaintiff need not allege that, prior to the commencement of his action, he has made a demand upon the board of directors to commence suit against the president. And where all the stockholders are made parties to the action, this is equivalent to such plaintiff's suing for himself and all other stockholders similarly situated.

From the Tippecanoe Circuit Court.

*B. W. Langdon and J. A. Stein*, for appellants.

*Wilson & Adams, J. R. Coffroth and Chase, Wilstach & Chase*, for appellees.

**DOWNEY, J.**—This was an action by George Rogers, James H. Telford and Henry M. Carter against The Lafayette Agricultural Works, Thomas P. Emerson, John Purdue, Martin L. Pierce, William Clark, Hiram W. Chase and John Levering. It is alleged in the complaint, in substance, that about the 1st day of October, 1867, the said Lafayette Agricultural Works became an incorporated company under the laws of the State of Indiana, with a capital stock of one hundred thousand dollars, divided into shares of fifty dollars each; that the plaintiff George Rogers became a shareholder in the sum of five thousand dollars; the plaintiff James H. Telford became a share-holder in the amount of — hundred dollars; and the plaintiff Henry M. Carter, in

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the amount of seven thousand five hundred dollars, all as original subscribers to the stock of said company, and yet own the same; that said defendant John Purdue became the owner, by subscription and purchase, of about eighty-three thousand dollars, which he still owns; that the defendants Martin L. Pierce, William Clark, Hiram W. Chase, John Levering and Thomas P. Emerson are the only other stockholders; but in what proportions the last named persons are such holders the plaintiffs cannot state.

It is alleged that the first directors of said company were the said John Purdue, Adams Earl, Fred. Geiger, Henry Taylor, M. L. Pierce, John Levering and John G. Sample, who elected said John Purdue president, George Rogers treasurer, etc., and Henry M. Carter superintendent of the works, and the company commenced business; that the object was to manufacture the reaper and mower known as the Buckeye machine, then and since in general use; that the company became the owner of real estate, machinery, tools, etc., and during the first year manufactured and sold a large number of such reapers and mowers at great profit, making thirty per cent. net upon the entire capital stock, and the same was the case during the next or second year, and the third year the profits would have been still greater but for the facts following; that said Purdue, before the end of the third year, became the owner of stock to the amount of eighty thousand dollars, well knowing that the business had been and was likely to continue profitable, and commenced dictating to the officer keeping the accounts as to the manner of discharging his duties; and when, after the second year, that officer was preparing his showing of operations for that year, and was desirous of making an inventory, Purdue forbade the taking of such invoice and the making of any balance sheet, and demanded his retirement from office, and in October, 1869, caused the election of a new board of directors, consisting of John Purdue, Martin L. Pierce, William Clark, Hiram W. Chase, James H. Telford, Thomas P. Emerson and John Levering; and, to qualify them to be

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directors, it is alleged that Purdue voluntarily assigned to Martin L. Pierce, William Clark and Hiram W. Chase, stock in the company, so that, with the votes of said Pierce, Clark and Chase, he became the sole arbiter of the business of the company and its operations. It is further stated that the directors so elected organized by re-electing said John Purdue president, and at his request he was, by a resolution of the board, intrusted with the entire and exclusive control and management of the business of the company. At the same meeting, John Levering was elected secretary, Martin L. Pierce treasurer, and John Purdue executive committee. It is alleged that Purdue was unfit for the discharge of any of such duties, was unacquainted with the machinery in use, unskilled in mechanics, ignorant of book-keeping, and incompetent from age and want of memory. Yet the said directors continue to intrust to him the management of the business of the company, and in nowise changed the resolution by which he was so intrusted; that immediately after such powers were so intrusted to him, he placed in charge of the books persons willing to do his bidding, and improper charges have been made in his favor against the company for money which he claimed to have loaned the company, but without any authority from its directors or stockholders. He has purchased real estate not necessary to carry on the operations of the company, without the consent of the corporation or the authority of the board of directors, at large expense, which he has caused to be charged to the company. He has charged the company for money loaned, in the sum of about sixty thousand dollars, which he was not authorized by the company to borrow, and for which he had no authority to bind the company, and for which there was no necessity, etc., and he is claiming to have expended the same in erecting for the use of the company buildings on the company's grounds without any necessity therefor, etc. It is further alleged that for six years after the organization of the company, Purdue caused it to be understood by the other shareholders of the company that he would make no charge for

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his services, and no charges were entered upon the books in his favor until December, 1873, when, without the consent of the directors, he caused to be entered on the books charges in his favor in the sum of fifteen thousand dollars, for his salary as president, to which he had no right. He has also charged for interest thirty-four thousand dollars, at ten per cent., which was without authority. He, by his mismanagement, failed to secure a renewal of the right from the patentees to manufacture the Buckeye reaper and mower, but on his individual account became interested in the "Planet" machine, and engaged in the manufacture and improvement of that machine, and for this purpose used the buildings, machinery, etc., of the company, the use of which was worth fifteen thousand dollars per year, which he has kept from the books of the company, which were under his exclusive control; and that the company had no interest in the manufacture, etc., of the Planet machine. It is alleged that there is a charge on the books in his favor, amounting to thirty-six thousand dollars for such expenses, which depletes the stock of the company. He has, from the time of the organization of the company, received all the emoluments, has refused to insure, and has placed in the shop incompetent men, including three of his nephews.

It is further alleged that he has given out within ten days, through his counsel, that it is his purpose to have his account against the company, as it appears upon the books, audited and ordered to be paid, and put the same into judgment, and press the same to execution, and sell the property and franchises of the company so as to exhaust its entire assets and stock; that he has in the board of directors three members to whom he gave stock, one of them being his nephew, and that, excepting the plaintiff Telford and the defendant Levering, all the directors are willing and will consent to audit said Purdue's account as it appears on the books, without any question as to the propriety of the items thereof charged to be unjust; that, in pursuance of his threat, he caused a meeting of the board of directors to be assembled at his

room in the Lahr House, in, etc., on Friday, the 9th day of October, 1874, at which all the directors, except the plaintiff James H. Telford, were present, and at which the only business was the reception of the resignation of Thomas P. Emerson as one of the directors and the appointment of a committee, consisting of M. L. Pierce, H. W. Chase and William Clark, to examine the books and accounts and report at an adjourned meeting, to be held at, etc., on the 12th day of October, 1874; that, unless restrained, the committee will, on that day, report in favor of the account, and the board will allow the same and order it to be paid, and thus enhance the difficulties of getting a just settlement of the account between Purdue and the company, and thereby greatly prejudice the interests of the plaintiffs as such shareholders in the company. Prayer,

1. That the directors and the company be restrained from admitting or allowing any claim of Purdue against the company until the further order of the court.

2. That the board be required to cause the property of the company to be adequately insured.

3. That the interest, advancements for unnecessary buildings and real estate made by said Purdue without proper authority, the account for salary of said Purdue, and all the matters of the "Planet" account be declared illegal and improper charges against the company; and that the board of directors cause the books of the company to be so corrected as to show said account correctly when ascertained by the court.

4. That the court may take the account between the company and the said Purdue on the basis herein claimed.

5. That by order of the court the said board of directors be adjudged to resume the control of the business of said company, and to suspend the functions intrusted to said Purdue by its orders of October, 1869.

6. That the plaintiff may be granted such other and further relief in the premises as may be just, equitable and proper.

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The complaint was filed on the 12th day of October, 1874, in term, at which time an injunction was granted until the 17th day of that month, when a several demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was filed. On a subsequent day of the term, the demurrer was sustained, the complaint adjudged insufficient, and the injunction dissolved. This ruling of the court is assigned as error.

It is said in the brief of counsel for the appellees, that the demurrer was based on two propositions; first, that the plaintiffs had not legal capacity to maintain this action to the extent of the relief asked; and, second, that the complaint does not state facts sufficient to constitute a cause of action.

Under the first proposition, it is submitted that a stockholder cannot maintain an action against the corporation in which he is such share-holder, under circumstances such as those disclosed in the complaint.

We have seen that the only ground of demurrer was, that the complaint does not state facts sufficient to constitute a cause of action. For this reason there is no question before us as to the want of capacity of the plaintiffs to sue. As to what is meant by want of capacity to sue, see *Debolt v. Carter*, 31 Ind. 355.

The other ground of objection to the complaint is, that it does not state facts sufficient to constitute a cause of action.

If the plaintiffs were entitled to relief against any of the defendants, as to such defendants the demurrer should have been overruled. If the plaintiffs were entitled to any relief under the complaint, whether injunctive or in some other form, the demurrer should have been overruled.

The main ground relied upon by the appellants is, that the complaint presents a proper case for an injunction.

It is submitted by counsel for the appellees, that the plaintiffs, as stockholders, cannot maintain the action; that, although stockholders in a corporation may maintain an action, in their own names, against the corporation and other stockholders and the directors, where a majority of the

directors commit acts, in the management of the corporation, whereby stockholders of one class receive greater profits or privileges than other stockholders, yet, to authorize such a suit, there must be such fraud charged against a majority of the directory as will amount to a breach of trust, or where the acts of the directors are *ultra vires* the corporate authority; and that they cannot sue for mere mismanagement or because so large profits have not been made to the corporation as could have been made under a different management.

Counsel for the appellants submit that the circumstances under which stockholders can maintain an action against the corporation and a majority of the board of directors, without making previous demand upon the directors to sue, occur whenever the capital or profits of the company are about to be misapplied or wasted by them, so as to result in lessening the dividends or impairing the value of the shares of stock; and such misapplication or waste is, 1. *Ultra vires*. 2. Fraudulent. 3. Is threatened by a majority under the control of the wrong-doer.

It is urged that "any application of the credits or property of a corporation, that would depreciate stock, to purposes or objects outside the purview of the organic act, is *ultra vires*. To apply them to external enterprises, or adventures, or objects of charity, or any other end than that contemplated by its charter, is liable to this objection. The rule cannot be disputed. Here the effect of making a settlement and passing the accounts of Purdue, without deducting the rental of the company's capital, works and machinery, amounting to about forty-five thousand dollars—ignoring even its existence, as charged in the bill—is equivalent to an appropriation of that amount to Purdue without any consideration. It is, in effect, a pure donation of that sum. It is a misapplication or waste without color of justification in the charter. There is no power to do this."

When a person embarks his means in the enterprises of a corporation, he thereby agrees that the affairs of the com-

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pany shall be directed and controlled by such directors or other controlling body as the stockholders may designate, and he has no ground to complain while such directors, etc., carry forward such enterprises in good faith and within the authority conferred by the charter. But neither the directors nor the majority of the stockholders can do as they please with the property represented by the shares of the stockholders. They must not act fraudulently, nor must they exceed the powers conferred upon them by the law creating or governing the corporation.

The protection of the rights of share-holders in incorporated companies against the improper or illegal action of other share-holders or of the officers of the company is a favorite branch of the jurisdiction of equity by injunction, and it may be asserted, as a general rule, that courts of equity will enjoin, on behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises, as well as the improper management of the business of the company, or a wrongful diversion of the funds. And, in such cases, equity may grant relief at the suit of a single stockholder. So, if the managers of the company are about to engage in any enterprise not contemplated by their charter, or are proceeding to apply the corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere. *High on Injunctions*, sec. 767; *March v. The Eastern R. R. Co.*, 40 N. H. 548; *Dodge v. Woolsey*, 18 How. (U. S.) 331.

Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers to whom such powers are confided. And it is a well settled principle of equity, that where acts requiring the exercise of judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be legally disturbed, nor will such officers

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be enjoined, except when abusing their powers to the injury of others. High Injunction, sec. 763.

The only act, which it is alleged is about to be done, sought to be enjoined, is the apprehended allowance of the account of Purdue, when it shall be reported upon by the committee. Every other act of which complaint is made is already accomplished. Would the allowance of the account, as correct, be such an act as would justify the granting of an injunction? Would that act work such irreparable mischief or damage as to justify the interposition of the court? We think it clear that the mere allowance of a fraudulent account, and such this must be if the allegations of the complaint are true, would not conclude any one. *Waite v. Windham County Mining Co.*, 36 Vt. 18.

We conclude that, so far as the complaint sought injunctive relief, the demurrer to it was properly sustained. If it appeared that irreparable damage would result to the plaintiffs by the allowance of the account, the case might be different. No authority has been furnished showing that an injunction has ever been granted to restrain such an act.

We are next to inquire whether or not the complaint shows the plaintiffs entitled to any relief other than by injunction, and whether or not they are in a condition to assert such right.

It appears from the complaint that the company made thirty per cent. profits on the capital stock during the first year and the same amount during the second year. It is also alleged that profits to a greater amount were earned during the third year, which Purdue would not allow the books to be made to show. It is also alleged that he is largely indebted to the company for the use of its machinery, etc., while engaged in experimenting upon and manufacturing the Planet Reaper and Mower. It is alleged that he has, from the time of the organization of the company, received all the emoluments of the company, and has not accounted for the same.

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Rogers *et al.* v. The Lafayette Agricultural Works *et al.*

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It is alleged that the directors are under the influence and control of Purdue and are instruments to do his bidding; that they have abdicated their proper functions and surrendered the entire control of the affairs of the corporation to him, three of them, and one of the three being his nephew, not having been *bona fide* stockholders, but having been made such by the voluntary transfer of stock to them by Purdue, to qualify them to act as such.

Under these circumstances, it seems to us to be unnecessary for the plaintiffs to show that they demanded of the board of directors to commence an action against Purdue, before they commenced this action. *March v. Eastern R. R. Co.*, 40 N. H. 548; *Robinson v. Smith*, 3 Paige, 222; *Dodge v. Woolsey*, 18 How. 331; *Brewer v. Boston Theatre*, 104 Mass. 378; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Goodin v. The Cincinnati, etc., Co.*, 18 Ohio St. 169; *Peabody v. Flint*, 6 Allen, 52; *Sears v. Hotchkiss*, 25 Conn. 171; *Wright v. The Oroville, etc., Co.*, 40 Cal. 20; *Allen v. Curtis*, 26 Conn. 456.

With reference to the right of a stockholder to maintain an action to compel a dividend, see *Smith v. Prattville Manufacturing Co.*, 29 Ala. 503.

We think the complaint is sufficient to entitle the stockholders, who are plaintiffs, to maintain the action, not for an injunction, but for relief against the wrongful acts of Purdue. To what extent the directors acting in the interest of Purdue and in disregard of their duties as such are liable, if at all, we need not now decide. *Sed vide Bartholomew v. Bentley*, 1 Ohio St. 37.

Where stockholders sue, it is usual for them to sue for themselves and all others similarly situated. But in this case all the stockholders are parties to the action, which may be regarded as a compliance with this rule of practice.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF INDIANA,**  
**AT INDIANAPOLIS, MAY TERM, 1876, IN THE SIXTIETH**  
**YEAR OF THE STATE.**

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**THE STATE v. WRIGHT ET AL.**

52 307  
144 243

**CRIMINAL LAW.**—*Statutory Description of Offence.*—An indictment under a statute, and therefore every indictment in this State, must embrace a charge of all the particulars that enter into the statutory description of the offence, either in the language of the statute or other equivalent language.

**SAME.**—*Assault and Battery.*—An indictment for an assault and battery which fails to allege that the unlawful touching, etc., was done either in a rude or insolent or angry manner, is bad.

From the Allen Criminal Circuit Court.

*C. A. Buskirk*, Attorney General, and *S. M. Hench*, Prosecuting Attorney, for the State.

*E. O'Rourke*, for appellees.

**WORDEN, J.**—Indictment charging that, on, etc., “Charles Wright, Frederick Weston and George Chapman, at said county of Allen, and State of Indiana, in and upon one Jonathan Fleming, did unlawfully make an assault, and him,

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The State *v.* Wright *et al.*

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the said Jonathan Fleming, did then and there unlawfully touch, strike, beat and wound, contrary to the form of the statute," etc.

This indictment, on motion of the defendants, was quashed, and the State excepted and brings the case here for revision.

The statute defining the offence of assault and battery provides, that "every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459, sec. 7. It will be observed that the unlawful touching, striking, etc., is not alleged in the indictment to have been perpetrated either in a rude, insolent or angry manner. To constitute an assault and battery under this statute, it is not enough that there was an unlawful touching, but the manner of the touching must have been either rude, insolent or angry.

It is a well established principle of criminal pleading, that in indictments upon statutes (and we have none other in Indiana), the indictment must embrace a charge of all the particulars that enter into the statutory description of the offence, either in the language of the statute or other equivalent language. It is urged by the counsel for the State that the allegation that the touching, etc., was unlawfully perpetrated, is equivalent to an allegation that it was done in a rude, insolent or angry manner.

There would be force in this view, if the legislature had not required, in order to constitute the offence, that the touching should be unlawful, as well as that the manner of it should be rude, insolent or angry. We cannot suppose that the legislature intended by the use of the word "unlawfully" to convey all the ideas expressed by the words "in a rude, insolent or angry manner." Such a construction would make the statute consist, in a measure, of redundant verbiage. See *Landringham v. The State*, 49 Ind. 186. We are of opinion that the indictment was bad, as not containing a charge of all the elements entering into the statutory description of the offence, and that the court committed no

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Sullivan *et al.* v. The State.

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error in quashing it. We are aware that there are some decisions in this State that would seem to uphold such an indictment, but we are satisfied that, on principle and the current of authorities, the decision below should be sustained.

The judgment below is affirmed. .

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SULLIVAN ET AL. v. THE STATE.

CRIMINAL LAW.—*Obstruction of Highway.*—On the trial of a prosecution for obstructing a highway, it was not error to instruct the jury that before they could convict they must be satisfied, beyond a reasonable doubt, that there was a public highway where it was claimed that the obstruction had been placed, that there was an obstruction, and that the defendants, or some one or more of them, caused the obstruction.

HIGHWAY.—*Dedication.*—The fact that a road has been used by the public for a considerable length of time, with the knowledge of the owners of the land, does not create a presumption of dedication, unless such use be also with the consent of said owners.

SAME.—*Obstruction.*—It was not error to instruct the jury, on the trial of a prosecution for obstructing a highway, that it was proper for them, in determining the question whether a highway existed by prescription, to inquire whether it was shown by the evidence that one of the defendants assisted in cutting out such road, and whether one of the defendants, while owning land over which it passed, admitted the existence of the highway.

CRIMINAL LAW.—*Instruction to Jury.—Reasonable Doubt.*—Where, on the trial of a criminal action, the court instructed the jury that “a reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury to a moral or reasonable certainty of the defendant’s guilt;” *Held*, that this was correct, and that if the defendant desired a more particular definition, he should have submitted to the court such an instruction.

From the Switzerland Circuit Court.

S. Carter, W. R. Johnston, J. A. Works and J. D. Works,  
for appellants.

C. A. Buskirk, Attorney General, W. H. Adkinson and  
W. D. Ward, for the State.

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Sullivan *et al.* v. The State.

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BUSKIRK, J. — This was a prosecution for obstructing a highway. Trial by jury; verdict of guilty; motion for a new trial overruled.

The assignment of error is based upon the action of the court in overruling a motion for a new trial.

The new trial was asked for the following reasons:

1. Error of the court in giving instructions numbered 1, 2, 3, 4 and 5.
2. Error of the court in refusing to give instructions numbered 1, 2, 3, 4 and 5, as asked for by appellants.
3. That the verdict is not sustained by sufficient evidence.
4. That the verdict is contrary to law.

There is no objection to the first instruction. By that the jury were charged that, before they could convict, they must be satisfied, beyond a reasonable doubt, of the following propositions: 1. That there is a public highway where the obstruction is claimed to have been placed. 2. That there was an obstruction. 3. That the defendants, or some one or more of them, caused the obstruction.

The second charge relates to the creation of highways by prescription. It is quite lengthy, and in view of the full and careful consideration of that question in the recent case of *Summers v. The State*, 51 Ind. 201, we do not deem it necessary to set it out in this opinion or to re-examine the question then so fully considered. The objection urged to it is, that the jury were informed that if the road had been used by the public for a considerable length of time, with the knowledge of the owners, a dedication might be presumed. The knowledge of the owner of the land is not enough, for he may have protested and objected to its use. It should have been with his knowledge and consent, or without objection on his part. This is settled by the above case and authorities there cited.

By the third instruction, the jury were told that it was proper for them, in determining the question whether a highway existed by prescription, to inquire if it is shown by

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The State v. Sowers.

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the evidence that one of the defendants assisted in cutting out such road, and whether one of the defendants, while owning land over which it passed, admitted the existence of the highway. We think this charge was correct.

Counsel for appellants do not, in their brief, urge any objection to the fourth charge, and we have not discovered any.

Counsel only complain of the latter portion of the fifth instruction. The portion claimed to be erroneous is as follows: "A reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury to a moral or reasonable certainty of the defendant's guilt."

The instruction, as given, is correct, and if the appellants desired a more particular definition of a reasonable doubt, they should have prepared and submitted to the court an instruction on such point.

We do not deem it necessary to examine the instructions refused, as, upon another trial, the court will have the opinion in the present case, and in that of *Summers v. The State, supra*.

For the error of the court in giving the second instruction, the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded for another trial, in accordance with this opinion.

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THE STATE v. SOWERS.

**LIQUOR LAW.**—*Intoxication in Public Place.*—If a person be found in a state of intoxication at a social party held at the residence of another, he is not thereby rendered liable to prosecution for being found intoxicated in a public place.

From the Parke Circuit Court.

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*Wynne et al. v. Cornelison et al.*

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*C. A. Buskirk*, Attorney General, and *A. F. White*, Prosecuting Attorney, for the State.

*D. A. Roach* and *J. E. Humphries*, for appellee.

PETTIT, J.—Indictment under section eleven of the act of March 17th, 1875, being an act to regulate and license the sale of spiritous, etc., liquors. Acts Special Session of 1875, p. 55. That section attempts to make it penal to be found intoxicated in a public place. The charge in the indictment is this: "Was then and there found unlawfully in a state of intoxication in a public place, to wit, at a social party held and had at the residence of Jackson Simmons." On motion of the defendant, the indictment was quashed, and the State appealed. We hold that there was no error in the ruling of the court. The private house of a gentleman, at which he gives or holds a social party, cannot, within the meaning of the statute, or in any sense of society or government, be understood to be a public place.

A public place is one where all persons have a right to go, while a social party given by a gentleman is a place where only those invited have a right to go or be present.

The judgment is affirmed.

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### WYNNE ET AL. v. CORNELISON ET AL.

**FRAUDULENT CONVEYANCE.**—*Answer.*—Complaint by a judgment plaintiff to set aside as fraudulent a conveyance of certain real estate made by the judgment defendant to a trustee, in trust for the grantor, after the accruing of the indebtedness and before judgment, and a conveyance by said trustee to the wife of the judgment debtor, executed after the rendition of the judgment, and to subject said real estate to sale, etc. Answer, admitting said conveyances, but alleging that said first conveyance was in trust for said wife, and averring the payment of a consideration by the wife by the conveyance of her separate real estate, denying notice of the indebtedness of her husband to the plaintiff, and denying fraud.

*Held*, that the answer was sufficient on demurrer.

**STATUTE OF LIMITATIONS.**—*Concealment of Cause of Action.*—*Fraud.*—The

52	312
133	309
52	312
136	164
52	312
149	243

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*Wynne et al. v. Cornelison et al.*

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provision of the statute that, if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute.

From the Clinton Circuit Court.

*J. N. Sims*, for appellants.

DOWNEY, J.—This was an action by the appellants, Jabez E. Wynne, George H. Christian, Gomer Wynne, Morris Fishel and Edward Fishel, against Jesse D. Cornelison, Martha A. Cornelison and Lewis C. Bonner. It is alleged in the complaint, that on the 1st day of September, 1860, the said Jesse D. Cornelison was indebted to said Jabez E. Wynne, George H. Christian and Gomer Wynne, as partners, in the sum of one hundred and eighty dollars and thirty cents, for which he executed to them his promissory note of that date, at six months; that on the 20th day of June, 1861, they recovered judgment on the note against him, on which an execution had been issued and returned no property found.

It is also alleged, that on the 8th day of June, 1860, said Jesse D. Cornelison was indebted to said Morris Fishel and Edward Fishel, as partners, in the sum of one hundred and sixty-six dollars and twenty-six cents, for which he then executed to them his note at six months; that on the 20th day of September, 1860, said Jesse D. Cornelison was further indebted to them in the sum of three hundred and thirty-five dollars and eight cents, for which he executed to them his note, to run for the same time; and that on the 6th day of November, 1860, said Jesse D. Cornelison became further indebted to said Fishels, in the sum of forty-nine dollars and sixty cents, by book account; that on the 20th day of June, 1861, they recovered a judgment against him for the amount of said notes and account, on which an execution had been issued and returned no property found.

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*Wynne et al. v. Cornelison et al.*

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It is further alleged, that said Jesse D. Cornelison, at the time said debts were contracted, was, and ever since has been, largely indebted to the plaintiffs and other persons, and much embarrassed, so that at the time of the rendition of said judgment he had no visible means held in his own name, not exempt from execution, whereby any part of said judgments could have been made; and that he has ever since that time remained in the same desperate condition, etc.; that in December, 1860, after said indebtedness was contracted, and when he was embarrassed as aforesaid, he being then the owner of certain real estate described in the complaint, in Frankfort, of the value of one thousand eight hundred dollars, to hinder, delay, and defraud his creditors, with his wife, the said Martha A. Cornelison, executed a deed for said property to one Timothy Cornelison, his brother; that said deed was executed without consideration, and in trust for the use of said Jesse D. Cornelison.

It is further stated, that after the rendition of said judgment, in December, 1861, the said Timothy Cornelison conveyed said property to said Martha A. Cornelison, wife of said Jesse D., without consideration, who, with her husband, then occupied the same, and has ever since continued in the occupancy thereof.

It is also averred, that, in 1871, said Jesse D. Cornelison and wife conveyed a part of said real estate to Lewis C. Bonner.

It is alleged, that the said property is now of the aggregate value of three thousand dollars, and that the plaintiffs' judgments are, in justice and equity, liens thereon. Prayer, that the deed from Jesse D. Cornelison and wife to Timothy Cornelison and that from Timothy Cornelison to said Martha A. Cornelison be set aside as fraudulent as to the plaintiffs; that said property be sold on execution; etc.

The defendants answered in six paragraphs. A demurrer to the second was sustained, and to the third was overruled. The fourth and fifth were struck out on motion of the plaintiff. There was a reply in denial of the sixth, and

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*Wynne et al. v. Cornelison et al.*

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a second paragraph of reply to the same paragraph of the answer. A demurrer to the second paragraph of the reply was sustained, and thereupon there was final judgment for the defendants.

Errors are assigned as follows:

1. Overruling the demurrer to the third paragraph of the answer.

2. Overruling the demurrer to the sixth paragraph of the answer.

3. Sustaining the demurrer to the second paragraph of the reply.

4. Rendering judgment against the plaintiff on sustaining the demurrer to the second paragraph of the reply.

We are first to examine as to the sufficiency of the third paragraph of the answer. It alleges, in substance, the following facts: That on the 20th day of December, 1860, said Martha A. was the owner in her own right of certain real estate in Clinton county, which is described in the answer, forty-four acres and a quarter; and one Susan Cornelison was the owner of certain other real estate in the same county, a description of which is not given; that it was then and there agreed between said Martha A. and said Jesse D. Cornelison, of the one part, and said Susan Cornelison and Timothy Cornelison, her husband, of the other part, that said Martha A. should convey her separate real estate aforesaid to said Timothy Cornelison, and in consideration thereof said Susan and Timothy should sell and convey the land of said Susan aforesaid, and pay the purchase-money therefor, or cause the same to be paid to the said Jesse D. Cornelison, and that said Timothy should receive the conveyance of the town property of Jesse D. Cornelison, the same as described in the complaint, and hold the same as trustee in trust for the said Martha, and convey the same to her as soon as the said property of said Susan should be sold for the benefit of said Jesse; that the said Timothy did then and there receive the conveyance of said town property in trust as aforesaid, and held the same one year, at the expiration

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Wynne *et al.* v. Cornelison *et al.*

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of which time said Susan and said Timothy sold and conveyed the lands of said Susan, the proceeds whereof were paid to said Jesse D. Cornelison by the purchaser; that, concurrently with said conveyance of the said Susan and said Timothy, said Martha A., her husband joining in the conveyance, conveyed her said separate property to the said Timothy, and the said Timothy and Susan, in pursuance of the previous understanding and agreement between said parties, did convey said town property to the said Martha A. Cornelison; that said Timothy held said town property only as a trustee for said Martha, and for no other purpose; that after said last mentioned conveyance said Timothy was finally discharged from his trust; that said Martha, said Susan and said Timothy were not aware of any indebtedness from said Jesse to said plaintiffs or others; that said transactions were *bona fide* and without any fraudulent intent whatever, or to hinder, delay or defraud said plaintiffs or others; wherefore, etc.

Counsel for appellants insists, in the first place, that the paragraph of answer admits the facts in the complaint, and that the facts detailed are consistent with the complaint. This position is hardly correct. It is true that the paragraph admits the making of the deeds, which, in the complaint, are alleged to be fraudulent; but it alleges a consideration paid by Martha A. Cornelison, by the conveyance of her separate property, and denies notice of the indebtedness of her husband to the plaintiffs, and also denies the fraud charged in the complaint.

It is also urged that Timothy Cornelison, according to the answer, held the property in question, without consideration, in trust for the benefit of Jesse D. Cornelison, for one year from December, 1860. Rather, we think, he held the property in trust for Martha A. Cornelison. Such is the allegation of the answer, and the demurrer admits the truth of the allegation.

Again, it is objected that the executory contract between the two married women was void, and Martha A. Cornelison

never parted with the title to her property till after the plaintiffs' rights as judgment creditors had attached to the property in the hands of Timothy Cornelison; nor does it appear that the real estate of Martha A. was of equal value with that which she acquired.

We think the whole question involved here is whether the transactions were honest or not. We regard the paragraph as good, because it contains, among other things, a denial of the fraud charged. It is true that the answer does not state that the separate property of Martha A. Cornelison was of equal value with that which she received. Neither does it state that it was not of equal value. The evidence would probably have shown, on the trial, the truth as to this, had the case gone to trial. It is probable that this paragraph was unnecessary, and that it might have been rejected, on motion, as amounting only to the general denial; but, as no such motion was made, we need not decide that question. We hold that there was no error in overruling the demurrer to this paragraph.

Next, as to the sixth paragraph of the answer. It is as follows:

"The wrongs and frauds complained of by plaintiffs in their complaint accrued and were committed and consummated, and plaintiffs' cause of action accrued, more than six years before the commencement of this suit."

The statute of limitations requires actions for relief against fraud to be brought within six years. 2 G. & H. 156, sec. 210, cl. 4. The statute begins to run when the fraud is perpetrated. *Musselman v. Kent*, 33 Ind. 452. It is provided, however, that, if any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action. 2 G. & H. 162, sec. 219; *Potter v. Smith*, 36 Ind. 231. This last provision is as applicable to causes of action for fraud as to causes of action of any other nature. *Pilcher v. Flinn*, 30 Ind. 202. We think the answer was good.

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Wynne *et al.* v. Cornelison *et al.*

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We are next to consider the question as to the sufficiency of the second paragraph of the reply, which was held bad on demurrer. It was pleaded to the sixth paragraph of the answer. It alleges, that immediately from and after the conveyance to the said Martha A. Cornelison, of the premises in question, by the said Timothy Cornelison, on the 20th day of December, 1861, as stated in the complaint, the said Jesse D. and Martha A. Cornelison took possession of said property, and have ever since that time occupied the same as a residence, and openly professed and pretended and held out said fraudulent transaction to the world as a *bona fide* transaction between the parties thereto, and falsely and fraudulently professed and represented to the plaintiff and the creditors of the said Jesse D. and the public generally, that the said transaction was valid in law, and that the said Martha A. had, in ignorance of the rights of the plaintiffs and the other creditors of the said Jesse, paid of her own means a full and adequate price for the same, all of which was and is untrue; and the plaintiffs, being ignorant of the false and fraudulent character of said representations and acts, but supposing them to be true, were thereby misled and prevented from making the necessary inquiry and investigation to discover said fraud until a period within six years next before the commencement of this action; and by means of said fraudulent acts of said defendants, and said fraudulent acts mentioned and set forth in the complaint in this action, plaintiffs were unable to discover said fraud until a period within six years next before the commencement of this suit, and they commenced this action within less than six years, and within a reasonable time, after they discovered said fraud.

In *Boyd v. Boyd*, 27 Ind. 429, it was held that the concealment contemplated by the statute must be something more than mere silence; that it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character, but need not be concocted after the accruing of the cause of action, provided it operates after-

wards as a means of concealment, and was so intended. In other words, it was said, the defendant must not, at any time, do anything to prevent the plaintiff from ascertaining, subsequently to the transaction out of which the right of action arises, the facts upon which that right depends, either by affirmatively hiding the truth, enhancing the natural difficulty of discovering it, or by any device avoiding inquiry which would result in discovery; and if he do thereby escape suit for a time, the statute of limitations will not run during that time.

We are of the opinion that the second paragraph of the reply was not sufficient. The statute of limitations is a statute of repose, and where its operation is sought to be avoided because the right of action was concealed by the party liable to the action, the allegation and proof of the concealment should bring the case clearly within the section. The allegation that the defendants pretended and professed to the world that the transactions were *bona fide* transactions is too general to amount to anything. The representation that the transaction "was valid in law" can hardly be regarded as the representation of a fact, such as a party has a right to rely upon.

It is further stated, that it was represented that said Martha A. had, in ignorance of the rights of the plaintiffs and the other creditors of said Jesse, paid, of her own means, a full and adequate price for the property, etc. This is precisely what she now alleges as her ground of defence against the plaintiffs' action. We cannot think that the mere statement of the party's ground of defence can be regarded as such a concealment of the cause of action as will prevent the running of the statute of limitations.

The fourth assignment of error presents no question, for the reason that there appears to have been no objection or exception to the action of the court. Indeed, we infer that this action of the court was in accordance with the wish of the appellants. The entry shows that the appellants withdrew their general denial in their reply, and, failing to plead

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Runyon v. The State.

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further, judgment, without objection or exception, was rendered against them. They cannot now complain of this action of the court.

The judgment is affirmed, with costs.

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RUNYON v. THE STATE.

**LIQUOR LAW.—Agent of Licensee.**—A license to vend intoxicating liquors is not transferable, but a licensee who has not forfeited his license may carry on the business by an agent at the place designated in the license, and the agent will not be responsible as for selling without license.

From the Marion Criminal Circuit Court.

*J. Denton*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

**WORDEN, J.**—The appellant was indicted for, and convicted of, the offence of selling intoxicating liquor without license. The liquor was sold under the following circumstances:

Samuel McKay had a license for the sale of such liquors at the time and place of the sale. McKay and Runyon entered into the following agreement, in virtue of which the liquor was sold by Runyon, viz.:

“I, Samuel McKay, hereby hire George W. Runyon to act as my barkeeper, at my saloon on Massachusetts avenue, number forty-four (44), known as Pearl Saloon, and carry on said business for me for the period of one year from and after this date; the said George W. Runyon hereby agrees to take charge of said saloon and act as said barkeeper, and have such assistance as may be necessary in said business for the said period of one year, and further agrees to keep an orderly house, and sell no liquor to

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Runyon v. The State.

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minors, to persons intoxicated, or to habitual drunkards, and that he will sell no liquor on Sunday, or on other days prohibited by law, or after eleven o'clock at night, or suffer minors to play billiards or other games in said saloon. The said George W. Runyon hereby further agrees to indemnify said Samuel McKay against any damage arising out of any violation of this contract; his failure to do so will terminate this contract. In consideration of such employment, the said George W. Runyon hereby agrees to pay said Samuel McKay the sum of seven hundred dollars for the fixtures of said saloon, and twenty-five dollars per month out of the net earnings of said saloon as the said Samuel McKay's profits thereof. The said fixtures to be forfeited on the failure of the said George W. Runyon to perform in any particular the foregoing contract, the said Samuel McKay to have immediate possession of the same, and be at liberty to hire, as barkeeper of said saloon, any other person. In testimony," etc.

This agreement was signed by both McKay and Runyon.

A license to vend spirituous liquors is not transferable by assignment or otherwise. *Godfrey v. The State*, 5 Blackf. 151. A removal from the State by the licensee operates as an abandonment and forfeiture of the license, and after such removal he cannot carry on business in the State under such license. *Krant v. The State*, 47 Ind. 519. But while the licensee remains in the State, and has not otherwise forfeited his license, he may carry on the business by his agent, and the agent will not be responsible as for selling without license. *Pickens v. The State*, 20 Ind. 116.

In the case in judgment, it does not appear that McKay had in any manner forfeited his license. The agreement between McKay and the appellant did not attempt to transfer the license to the appellant, nor did it put him in possession or control of the saloon otherwise than as the agent of McKay.

We are of opinion that, under the facts, the appellant must

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Gordon v. The Board of Commissioners of Dearborn County.

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be regarded as having acted in the premises as the agent of McKay, and not liable to prosecution as for selling without license. A motion which he made for a new trial should have been sustained.

The judgment below is reversed, and the cause remanded for a new trial.

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GORDON v. THE BOARD OF COMMISSIONERS OF DEARBORN COUNTY.

52	329
149	427
148	428
58	322
153	373

52	322
171	638

**ATTORNEY.**—*Appointment of Attorney to Defend Poor Person.*—*Construction of Statute.*—Section 15 of the practice act (2 G. & H. 44), authorizing a court to appoint an attorney to defend a poor person, does not limit the power of the court to the appointment of only one attorney; the actual necessity of the case alone regulates the judicial discretion of the court in making such appointment.

**SAME.**—*Allowance by Court to Attorney for Defending Poor Person on Change of Venue.*—A circuit court, to which a change of venue has been taken for the trial of a felony, may appoint attorneys to defend the prisoner as a poor person, and make an allowance for the services of such attorneys, which shall have the same binding force upon the county from which the venue was taken as if made by the circuit court of that county.

From the Dearborn Circuit Court.

*J. Schwartz and Gordon, Browne & Lamb*, for appellant.  
*H. D. McMullen*, for appellee.

**BIDDLE, J.**—This case was brought before this court on appeal from the Dearborn Common Pleas, and the complaint held good. 44 Ind. 475.

Wherein the present complaint differs from the former one, if at all, we do not know; but the facts alleged in the complaint now before us, "as finally amended," may be stated as follows:

That, at the September term of the Dearborn Circuit Court, 1870, McDonald Cheek was indicted for the murder of Thomas Harrison; that, on application of Cheek, a change

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of venue was granted to the Franklin Circuit Court; that, on proper application, made to the Franklin Circuit Court by Cheek, the court appointed John Schwartz, a regular practising attorney, to assist Cheek in his defence; that afterwards, on the further application of Cheek, the said court also appointed the plaintiff to assist said Cheek in his defence, the said plaintiff also being a regular practising attorney therein; that the plaintiff, under said appointment, rendered eighteen days' services during the trial of said cause; that afterwards the Franklin Circuit Court ordered that the plaintiff be allowed the sum of two hundred dollars for said services so rendered on behalf of said Cheek, and that the auditor of Dearborn county should audit and allow the same, and draw his warrant therefor on the treasurer of said county, and that said treasurer should pay the same; that said services were reasonably worth said sum of two hundred dollars; that afterwards the plaintiff presented said order of appointment and allowance for said services, so made by the Franklin Circuit Court, to the board of commissioners of Dearborn county for allowance, and demanded payment thereof, which was refused; wherefore he demands judgment.

The several orders made by the court in the premises were filed as exhibits with the complaint.

A demurrer for the alleged want of sufficient facts was filed to this complaint, and, in obedience to the ruling of this court, heretofore made, was overruled. The appellee then answered in three paragraphs:

1. General denial.

2. "That at the time the plaintiff was appointed by the court to assist in the defence of said McDonald Cheek, as in his complaint stated, John Schwartz, an attorney of the Franklin Circuit Court, the counsel who had been previously first appointed by the court to defend the said Cheek, was present, ready to and did defend the said Cheek upon the charge in plaintiff's complaint mentioned, for which services they were ready to pay said Schwartz, and since

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have paid the said Schwartz, which payment was made before the bringing of this suit, all of which this plaintiff well knew."

A third paragraph of answer was filed, similar to the second, upon which issue of fact was taken by general denial, after a demurrer for want of sufficient facts had been overruled, and exception taken. A demurrer to the second paragraph of answer was overruled, and exception taken. The plaintiff, not wishing to reply, abided by the demurrer, and judgment was rendered against him, from which he appeals to this court.

The power of the court to appoint the appellant, on a second application, after it had appointed Schwartz on the first application, as stated in the answer, is denied by the appellee; and this raises the main question in the record.

Courts are established for the purpose of administering justice judicially, and their powers are coequal with their duties. The courts of England were originally created by the king's letters patent, but afterwards were established by act of parliament, with the king's assent. 3 Blackstone Com. 23-29. In this State, courts are created by the constitution and acts of the General Assembly (Const., art. 7, sec. 1), and, when once established and their jurisdiction defined, they have the inherent power to perform the duties required of them, whether expressly granted or necessarily implied.

In *Webb v. Baird*, 6 Ind. 13, this court held, and we think correctly, that the circuit court had the power to appoint an attorney to defend a pauper, from the necessity of the case, without a statute authorizing the appointment. This case was approved in *The Board of Commissioners of Fountain County v. Wood*, 35 Ind. 70, where the question is fully discussed. See, also, *Kerr v. The State*, 35 Ind. 288.

But it is contended by the appellee, that section 15 of the practice act, 2 G. & H. 44, "only authorizes the court to appoint an attorney, and does not confer the power to appoint two or more attorneys to defend," etc.; and that, "by assign-

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ing Schwartz to conduct the defence, the authority of the court was exhausted; and therefore the appointment of Gordon afterwards was without authority."

We do not think the power to make such an appointment rests solely on the section cited. We have seen by the authorities, *supra*, that the power is inherent in the court, to be exercised whenever the administration of justice judicially requires it to be done. Besides, section 4 of the act authorizing allowances enacts, that the courts "may allow sums \* \* \* \* \* to persons performing any services under the order of such court. But the number of such assistants employed shall never exceed the actual necessity of the case."

Sections 2 and 3 of the same act authorize the auditor to draw his warrant upon the treasurer for the amount of such allowances. 1 G. & H. 64.

In the present case, there is nothing in the paragraphs of the answer which are demurred to, to show that the appointment of Gordon, after Schwartz had been appointed, exceeded "the actual necessity of the case;" and such an appointment, being regulated by the judicial discretion of the court below, in full view of all the facts and circumstances, which cannot be so clearly shown here, would not be revised by this court, unless the power was plainly abused.

We may add, though it scarcely appears necessary, as the point is not contested, that the Franklin Circuit Court had complete jurisdiction of the case (2 G. & H. 407, sec. 79), and that the order of appointment and the allowance made had the same binding force upon the board of commissioners of Dearborn county as if the case had been tried in the Dearborn Circuit Court, and the order of appointment and the allowance made therein.

The judgment is reversed; cause remanded, with instructions to sustain the demurrers to the second and third paragraphs of answer, and for further proceedings.

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Donniger v. The State.

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## DONNIGER v. THE STATE.

**CRIMINAL LAW.—Indictment.—Suffering Minor to Play a Game.**—An indictment against the owner of a billiard table for permitting a minor "to play a certain game said table, called pool," was bad because of the omission of the word "at" or "upon" before the words "said table."

**SAME.—Name of Person Playing with Minor.**—An indictment for permitting a minor to play a game upon a billiard table is defective, if it does not state the name of the person with whom the minor was permitted to play the game.

From the Decatur Circuit Court.

*J. D. Miller*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

WORDEN, J.—Indictment, charging that, on, etc., at, etc., "Herman Link and Joseph Donniger, who were then and there the owners of, and having the care, management and control of a certain billiard table, at said county, and did then and there unlawfully allow, suffer and permit Frank Gavin, who was then and there a person under the age of twenty-one years, to play a certain game said table, called pool."

The defendants moved to quash this indictment, but the motion was overruled, and they excepted. On trial by the court, Link was acquitted, but Donniger was convicted. The latter appeals, and has assigned for error the overruling of the motion to quash the indictment.

The indictment is based upon the following statutory provision, viz. :

"That if any person owning or having the care, management, or control of any billiard table, bagatelle table or pigeon-hole table, shall allow, suffer or permit any minor to play billiards, bagatelle or any other game at or upon such table or tables, he shall be deemed guilty of a misdemeanor," etc. Acts 1873, p. 30, sec. 1.

The indictment in this case does not allege that the minor was allowed to play the game of pool *at* or *upon* the billiard table, and in this respect it seems to be defective. The

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Hendricks, Governor, v. Hargrave.

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omission of the word "on" before the words "said table," as they occur in the indictment, may have been a clerical error in the transcription, but if so, this error could have been corrected, which has not been done. We must take the indictment as we find it in the transcript that comes up to us.

The indictment is also defective in another particular. It does not state the name of the person with whom the minor was suffered to play the game. This was necessary. *Zook v. The State*, 47 Ind. 463.

The court below erred in not sustaining the motion to quash the indictment.

The judgment below is reversed, and the cause remanded for further proceedings, in accordance with this opinion.

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### HENDRICKS, GOVERNOR, v. HARGRAVE.

**EXCEPTION.—Demurrer.**—The action of a court in overruling a demurrer cannot be presented to the Supreme Court, when no exception has been taken to the ruling.

From the Marion Civil Circuit Court.

*C. A. Buskirk*, Attorney General, for appellant.

*A. & J. E. Iglehart*, for appellee.

**PETTIT, J.**—The appellee brought suit for a mandate against the appellant, to compel him to issue a commission to the appellee as judge of the Criminal Circuit Court of Vanderburgh county. A demurrer for want of sufficient facts to the complaint was overruled, and this ruling alone is assigned for error. No exception was taken to this ruling, and, therefore, no question is presented in the record for our consideration.

The judgment is affirmed, at the costs of the appellant.

Isenhour v. Isenhour *et al.*

## ISENHOUR v. ISENHOUR ET AL.

DESCENT.—*Adopted Child.*—*Widow.*—An unmarried man, who had been married and whose wife had died, leaving surviving her said husband and one child, the issue of said marriage, which afterwards died, leaving surviving its said father, subsequently adopted a son in due form of law, and afterwards married again, and died intestate, seized in fee of certain real estate, leaving surviving said second wife and said adopted son.

*Held*, that said real estate descended, under section 23 of the statute of descents, one-half to said adopted son and the other half to the widow; and her share was not affected by the proviso of section 24 of said statute, and at her death would not descend to said adopted son, he not being the child of her said husband “by a previous wife.”

From the Miami Circuit Court.

*J. M. Wilson* and *R. P. Effinger*, for appellant.

*J. L. & J. Farrar*, for appellees.

BIDDLE, J.—Complaint for partition of lands. The pleadings need not be stated, as no question is made upon them. The case was tried by the court on the following agreed state of facts:

1. Levi Isenhour died, intestate, at Miami county, Indiana, where he resided before the commencement of this suit.

2. Many years before his death, about the year 1852, he lawfully married a woman, who bore him one child in wedlock.

3. After said marriage and birth of said child, the said wife of said Levi died, leaving surviving her the said Levi, her husband, and their said child.

4. After her death, the said child died, leaving surviving him his father, the said Levi.

5. After the death of the said wife and child of the said Levi, he, in due form of law, adopted and gave his name to the defendant, Daniel H. Isenhour, who was not his child, nor the child of his former wife.

6. After the death of his said wife and child and after the legal adoption by the said Levi of the said Daniel, the said Levi, on the 3d day of September, 1872, lawfully married

52	328
182	300
52	328
144	629

the said plaintiff, at Miami county, Indiana, who, at the time of the death of said Levi, was his lawful wife.

7. The said Levi Isenhour, at the time of his death, was the owner in fee simple of the lands and tenements in the complaint described.

The finding of the court was as follows:

“That the plaintiff is entitled to a life estate in one-third of the real estate described in the plaintiff’s petition, and the defendant, Daniel H. Isenhour, is entitled to the residue of said estate in fee simple.” Judgment accordingly.

Exceptions and appeal have brought the case before us. What is the share of the widow? and what of the adopted son? These are the questions for us to decide.

The rights of an adopted child, under the act regulating the adoption of heirs, 1 G. & H. 301, sec. 3, are to “take the name in which it is adopted, and be entitled to and receive all the rights and interests in the estate of such adopted” [adopting] “father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted” [adopting] “father or mother.”

In the present case, Daniel, having been adopted by Levi Isenhour alone, and not adopted by his previous wife, must be held as the child of Levi, without reference to what woman was his mother. If he had been adopted by both, perhaps he might have been held as a child “by a previous wife,” within the proviso in section 24 of the act regulating descents, 1 G. & H. 295. The law can endow an adopted child with all the rights in property of a natural child, but it has not the power to make him the natural child of any woman but his natural mother. Daniel, not being the natural child of a previous wife of Levi, and not having been adopted by a previous wife of Levi, cannot be held to be the child of a previous wife of Levi. Under the act, it was not in the power of Levi to adopt Daniel as the child of a previous wife; he could adopt him, but could give him only the rights of a natural heir of his own, without reference to the mother who bore him.

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Louthain v. Lusher.

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This is in harmony with the construction of the act regulating the adoption of heirs heretofore given by this court. *Barnes v. Allen*, 25 Ind. 222; *Barnhizer v. Ferrell*, 47 Ind. 335.

In our opinion, Eliza Isenhour and Daniel H. Isenhour inherit under the 23d section of the act regulating descents; each is entitled to one-half of the real estate described in the complaint; and the share of Eliza is not subject to the proviso in section 24 of the same act.

If we are right in this view, it follows that the court below erred both in its finding and judgment.

The judgment is reversed, with costs; cause remanded for further proceedings, according to this opinion.

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LOUTHAIN v. LUSHER.

**BASTARDY.**—*Cost of Keeping Defendant in Prison.*—The relatrix in a prosecution for bastardy is not required to pay the cost of keeping the defendant, when he is imprisoned on the final order or process of the court.

From the Cass Circuit Court.

*D. P. Baldwin* and *D. D. Dykeman*, for appellant.

**DOWNEY, J.**—The question in this case is whether or not a relatrix in a prosecution for bastardy is required to pay the cost of keeping the defendant, when he is imprisoned on the final order or process of the court. It is urged that under section 4, p. 410, 1 G. & H., she is so required. The question has been decided otherwise, and in accordance with the ruling of the circuit court. *Ex Parte Haase*, 50 Ind. 149. And see, also, sec. 5, succeeding the one referred to.

The judgment is affirmed, with costs.

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Semans v. Harvey.

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## BUTTS v. THE STATE.

From the Benton Circuit Court.

*R. S. & Z. Dwiggin*s, for appellant.

*C. A. Buskirk*, Attorney General, and *S. P. Thompson*, Prosecuting Attorney, for the State.

BUSKIRK, J.—The appellant was indicted, in the county of Newton, for incest with his daughter. The venue was changed to the Benton Circuit Court, where the appellant was found guilty, and, over a motion for a new trial, judgment was rendered on the verdict.

The only error relied upon here is the overruling of the motion for a new trial, and the only reason for a new trial is, that the verdict is contrary to the evidence. We have carefully read and duly considered all the evidence in the record, and, after thoughtful consideration, we have arrived at the conclusion that the evidence is not sufficient to sustain the conviction. In our opinion, the court erred in overruling the motion for a new trial.

The judgment is reversed, and the cause is remanded for a new trial. The clerk will give the necessary notice for the return of the prisoner to the jail of Benton county.

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SEMANS v. HARVEY.

**TAX.**—*Tax on Land Sold Under Decree of Foreclosure.*—The purchaser of real estate under a decree of foreclosure of a mortgage, who, after the conveyance thereof to him by the sheriff, to prevent the sale of such land, has paid taxes accrued and properly charged, prior to said sale, against one who was the owner in fee of said land, subject to said decree and mortgage, which taxes constituted a lien upon said land, cannot, without showing a warranty in said mortgage or any contract of the mortgagor to pay the taxes that might accrue on the mortgaged premises, recover of said owner the amount of the taxes so paid.

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Semans v. Harvey.

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From the Hamilton Circuit Court.

*D. Moss* and *F. M. Trissal*, for appellant.

*W. O'Brien* and *R. Graham*, for appellee.

DOWNEY, C. J.—The appellee sued the appellant for money had and received and for work and labor performed.

The defendant pleaded several paragraphs of answer, to the fourth of which a demurrer was sustained. There having been judgment for the plaintiff, the defendant appealed to this court, and has here assigned as error the ruling of the circuit court in sustaining the demurrer to the fourth paragraph of the answer.

The paragraph in question contains the following facts: that on the 19th day of May, 1870, the defendant purchased at sheriff's sale, on a decree of foreclosure, certain real estate in Hamilton county, which was then owned, in fee simple, by the plaintiff, subject to such decree and the mortgage on which the same was rendered; that for three years prior to said sale the plaintiff had been a resident of said county and taxable therein, during which time taxes had accrued against him, and were charged on the proper duplicate of said county, amounting to three hundred and fifty-three dollars and thirty cents, which said taxes the plaintiff had failed to pay, and the same were a lien on said real estate; that the plaintiff failed to redeem said land, and the same was conveyed by the sheriff to the defendant; that thereafter the defendant paid said taxes to prevent the sale of the land; that said taxes ought to have been paid by the plaintiff, and that the defendant paid the same for the use of the plaintiff; that the plaintiff has failed and refused to pay to the defendant said amount of money, although often requested, and the defendant offers to set the same off against, etc., and demands judgment for the residue, etc.

In favor of the sufficiency of the answer, the appellant's counsel refer to *Rardin v. Walpole*, 38 Ind. 146, *Evans v. Bradford*, 35 Ind. 527, and 2 Greenleaf's Ev. 111, sec. 114.

We think these authorities do not warrant the position

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Semans v. Harvey.

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assumed. The paragraph in question does not disclose any warranty in the mortgage or any contract on the part of the mortgagor to pay the taxes that might accrue on the mortgaged premises. The question turns on the effect of the judicial sale of the premises. Mr. Rorer, in his work on judicial sales, p. 167, states the law with reference to such sales as follows:

“It is a well settled principle that in judicial sales there is no warranty. This principle, as a general rule, holds good as to all those sales of real property (they being in character judicial sales) made in equitable proceedings, under the direction and control of the courts, usually denominated mortgage sales, guardian’s, executor’s, and administrator’s sales, sales for enforcement of vendor’s and statutory liens, and sales in proceedings for partition. In short, in all sales made under supervision and control of the courts on decrees in equity or on decrees made in the exercise of equity powers, there is no warranty; the purchaser takes what he gets. The officer, trustee, or person executing the deed is the mere ‘agent or instrument’ of the court; is not liable for defect of title or insufficiency of the proceedings; nor at all, except for fraud, unless he conveys with warranty, and then the covenant of warranty binds him personally and him only.”

The authorities cited by the author seem to sustain his statement of the rule. Suppose there had been a prior mortgage or judgment on the property, and the appellant had, after his purchase of the premises, paid off such prior mortgage or judgment, could it be held that he had thereby acquired a cause of action against the appellee for the amount paid? We think not. It seems to be settled that the mortgagee may pay taxes on the premises, prior to foreclosure, to preserve the security, and, in such case, have the same allowed to him in the judgment as a part of his claim against the mortgaged premises. This is no more than he may do as to any other valid prior incumbrance, which it is necessary for him to pay in order to preserve his security. *The*

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*Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Faure v. Winans*, Hopk. Ch. 283; *Barr v. Veeder*, 3 Wend. 412; *Rapelye v. Prince*, 4 Hill, N. Y. 119; *Robinson v. Ryan*, 25 N. Y. 320. But not having taken this course, but having purchased the land with the incumbrance upon it, it may be presumed that he took the incumbrance into account in determining the amount which he would pay, and that he bought the land with the understanding that he would have to discharge the incumbrance in addition to the amount bid by him at the sale of the premises. We hold that there was no error in sustaining the demurrer to the fourth paragraph of the answer.

The judgment is affirmed, with five per cent. damages and costs.

## HODGSON v. JEFFRIES.

59	334
136	285
59	334
146	253
52	334
161	119

**EASEMENT.** — *License.* — *Drain.* — A license by the owner of land to the owner of adjoining land to construct and use perpetually a ditch over the land of the former for the purpose of draining the land of the latter, may be verbal, and, upon such construction and continued use, is irrevocable by the grantee of the former, though unforeseen injuries result to the former and his grantee from the construction and use of such drain.

**EVIDENCE.** — *Witness.* — In an action by or against heirs, founded on a contract with the ancestor, affecting the property of the ancestor, it must be made to appear, in some legal way, that the ancestor is dead before an objection can be sustained to the competency of a party to testify as to a matter which occurred prior to the assumed death of the ancestor.

**SAME.** — *Construction of Statute.* — The grantee of land, though the son of his grantor, cannot object to the competency of a party to an action against him, which is founded on a contract with his father, affecting said land, to testify as to a matter which occurred prior to the death of his father. Section 2, 3 Ind. Stat. 560, does not apply in such a case.

**SAME.** — *Drain.* — *License.* — In an action by one who has constructed and maintained a drain from his own land across the land of another by the alleged license of the latter, for an obstruction of the drain by the latter, the plaintiff may properly show in evidence, as showing the extent of the injury caused by the obstruction, that there was no other outlet than said drain for the water flowing in the lateral ditches cut by him on his own

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land; but the defendant cannot show that plaintiff had another outlet than said drain, over his own land, by which he could drain his marshy and wet land, when such evidence does not tend to show that the flow of water in said lateral ditches could be carried off without the aid of said drain; nor in such an action can the defendant, for the purpose of showing that such license had not been given, or, if given, had been revoked, prove that he or his grantor had built, close to the drain, his house and barn, and made other improvements which could not properly be enjoyed if the drain should be continued.

INTERROGATORIES TO JURY.—A jury can be directed to answer interrogatories only on condition that they find a general verdict.

VENDOR AND PURCHASER.—*Notice.—Drain.*—A jury may infer that the purchaser of land over which an open drain, with water flowing therein from the land of another adjoining, passes near the barn and barn-yard on the land purchased, had knowledge of the rights of the owner of said adjoining land to maintain said drain and flow the water from his own lands through it.

From the Henry Circuit Court.

*J. & J. M. Brown*, for appellant.

*M. E. Forkner* and *E. H. Bundy*, for appellee.

DOWNEY, C. J.—The appellant, who was defendant below, assigns three errors in this case, viz.:

1. Overruling the demurrer to the complaint.
2. Sustaining the demurrer of the appellee to the second paragraph of the answer.
3. Overruling the defendant's motion for a new trial.

It is stated in the complaint, that the plaintiff is, and for twenty years last past has been, the owner of certain real estate, particularly described in the complaint; and that the defendant is and has been the owner of a certain other tract of land; that there runs through the lands of the defendant a natural stream of water, about thirty rods from the line dividing the lands of plaintiff and defendant; that the lands of the plaintiff are low and wet, and require draining, and that there is no outlet for that purpose, except through the lands of the defendant into said stream; that, in the year 1858, the defendant's father, Ellis Hodgson, was the owner of the land now owned by the defendant, and continued to own and occupy the same until about a year ago, when he

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conveyed the same to the defendant; that the lands of the the defendant, lying between the said watercourse and the lands of the plaintiff, are wet, low and unfit for cultivation, unless drained; that, in the year 1858, the said Ellis Hodgson, in consideration that the plaintiff would cut a drain from the lands of the plaintiff to said watercourse, through the lands now owned by the defendant, and the benefits of said drain to the lands of the said Ellis Hodgson, gave the plaintiff a license to cut a drain from his land through the said lands owned by defendant into said watercourse, and to discharge water through the same, etc., thenceforth perpetually, so long as it might be necessary to drain his said land. It is then alleged that, on the faith of said license, the plaintiff did, in the year 1858, cut a large drain from his lands through the lands of the defendant, for a distance of thirty rods, into said watercourse, at a large expense; and, upon the faith of said license, he has cut and constructed a system of drains, in all three hundred rods, at an expense of three hundred dollars, upon his own lands, which discharge the water through said drain into said watercourse, and has so done for fifteen years; that said Ellis Hodgson, during all the time plaintiff was cutting and constructing said ditches, stood by, etc., and saw plaintiff expend thereon five hundred dollars and a large amount of labor and time, and did not object or controvert the plaintiff's right to cut the same or to flow the water, etc., but, by words and acts, encouraged the same; that, for fifteen years, he has uninterruptedly enjoyed said right, etc. . It is then alleged that the defendant has filled up and obstructed said ditch, and rendered the same useless, and the plaintiff's lands are rendered unfit for cultivation, etc. Prayer for judgment quieting and confirming the plaintiff's rights, and for two hundred and fifty dollars damages, etc.

It is hardly necessary to re-examine the authorities bearing on the question here involved, as the law with reference to it seems to be settled in favor of the sufficiency of the complaint. The question is, whether the license given by

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the grantor of the defendant could be revoked by the defendant, under the circumstances alleged. It is held that it could not. *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, 19 Ind. 367; *Lane v. Miller*, 27 Ind. 534; *Miller v. The State*, 39 Ind. 267.

In the second paragraph of the answer, the defendant avers that at the time his father gave consent to the plaintiff to cut said ditch, if he ever gave any such consent, the land was in woods, and he did not and could not foresee that it would be of any particular injury to him; that both tracts of said land were to a great extent covered with brush, prairie grass, logs, etc., and no great amount of water seemed to accumulate in or on the same, and since that time the plaintiff and the father of the defendant, as well as the defendant himself, have cleared their several tracts of land and put the same in cultivation; that the plaintiff owns over two hundred acres of land, and the defendant owns but forty acres of land, described in the complaint; that since the land of defendant has been cleared off, the water accumulates and runs to the head of said ditch more rapidly than before, and is thrown upon said defendant's lands by means of said ditch in large currents and freshets, and, without any direction so to do from the defendant or his father, the plaintiff has cut a system of lateral ditches on his own ground into said main ditch, and thereby augmented the rapidity of the flow of the water on the defendant's land; that since the land of defendant has been cleared and cultivated, and the roots have rotted away, the soil has become much more porous and susceptible of washing; and that said ditch is now, and has been for years past, doing great damage to the defendant's land; that said water has washed away the soil and widened said ditch, and thereby diminished the value of defendant's land, and is constantly encroaching upon the defendant's soil and washing the same away, and has washed in many places sixteen feet wide; that during the time of freshets and high waters the natural stream passing through

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defendant's land, in consequence of the amount of water flowing therein from said ditch, swells to an unnatural height and overflows. It is further alleged that the plaintiff, at all times from the cutting of said ditch, has left the same open and uncovered, and the defendant's horses, cattle and hogs, while pasturing upon the grounds and fields of the defendant through which the ditch runs, when passing over and along the same, cut and work the soil therein with their hoofs, and the defendant cannot plough over said ditch, but has to turn and leave a large amount of ground next thereto uncultivated, and, to keep said ditch in proper condition to flow the water from plaintiff's premises, the defendant will have to build a fence on each side of said ditch, leaving a considerable space of ground and thereby creating a permanent obstruction through the defendant's ground; that the defendant's father and the defendant himself have built a house, barn and barn-yard, and planted an orchard on that part of the premises where this ditch passes, that being the most eligible site on said tract of land for said improvements; that these improvements were made at an expense of fifteen hundred dollars; that the ditch passes through the barn-yard of the defendant; that by reason of the facts above stated, if the ditch is allowed to remain on the lands of the defendant, it will work great and irreparable injury to said premises; wherefore, etc.

This paragraph of the answer is pleaded, and its sufficiency urged, on the ground that it sets up counter equities by showing that, although the license was given, yet the injuries resulting were unforeseen by the licensor. We do not think this answer a good bar to the action. Parties cannot be relieved from such acts on the ground that they did not foresee all their consequences.

Under the last error assigned, it is contended that the court erred in allowing the plaintiff to testify to the grant of the license by Ellis Hodgson. The ground of the objection was, that Ellis Hodgson was dead, and that according to the statute, 3 Ind. Stat. 560, sec. 2, his statements could not

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legally be testified to by the surviving party to the contract or arrangement. To this counsel for appellee answer, that it does not appear that it was shown to the court, when the objection was made, that Ellis Hodgson was dead. This position appears to be correct. The objection assumes that he was then dead, but the fact was not made to appear in any legal way. But we are of the opinion that the case does not fall within that section of the statute, if it appeared that he was then dead.

Again, it is urged that the court erred in allowing the plaintiff to testify that he had no other outlet but the main ditch for the water flowing in the ditches cut by him on his own land, and in refusing to allow the defendant to prove that the plaintiff had another convenient outlet over his own land to drain his marshy and wet lands. It is claimed that these rulings of the court were inconsistent, and that one or the other of them must be wrong. The admitted evidence, it is claimed, had no tendency to prove the license, that is, that to prove that there was a necessity for a drain did not tend to prove that a license was given to construct one. We think, if the only purpose of the evidence was to show a necessity for a drain, that it should have been excluded. But the evidence went to show that if the main ditch was obstructed, the smaller ditches, constructed by the plaintiff on his own lands, emptying into it, would become valueless, and was, we think, properly admitted to show the extent of the injury to the plaintiff from the obstruction of the main ditch. The offered evidence was not to meet the admitted evidence, and show that the water accumulated in the ditches on the plaintiff's land could be carried off without the aid of the ditch through the defendant's land; but it was to show that the plaintiff had another convenient outlet over his own land to drain his marshy and wet land. The offered evidence was properly excluded, because it did not meet any evidence admitted or properly admissible in the case, on the part of the plaintiff.

It is next urged that the court improperly refused to allow

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the defendant to prove that his grantor, Ellis Hodgson, had, in his lifetime, built his house and barn so near the ditch, and made his other improvements in such close proximity thereto, that they could not be properly enjoyed if the ditch should be continued. Counsel for appellant urge that this evidence would have served two proper purposes: 1. To show that no license had been granted to the extent claimed. 2. To show that if any such license had been granted, it had been revoked by the consent of Jeffries, the plaintiff.

We think the evidence was properly excluded. We cannot see that the offered evidence had any tendency to establish either view presented. The acts sought to be proved were those of one of the parties to the arrangement, with which the other party was not shown to have had any connection. Again, we cannot see why the defendant's grantor might not have chosen to construct his buildings near to the ditch as well as at a distance from it, without thereby affording any inference that he was opposed to the existence or continuance of the ditch. Nothing favoring the defendant could properly be inferred from the facts which he sought to prove.

It is next submitted that the court erred in refusing to propound to the jury an interrogatory asked by the defendant. Several answers are urged to this question. A sufficient one is, that the jury were not by it directed to answer it in the event that they found a general verdict. It is only in this conditional form that interrogatories can be properly asked. 2 G. & H. 205, sec. 336. This rule has been applied in many cases, which, however, we need not cite.

Counsel call our attention, in a general way, to the instructions given and those refused; but no specific objection is pointed out to any of those given; nor is it claimed that any particular instruction asked was improperly refused. Two exceptions should be made to this remark, and they are as to charge number 2 given, and charge number 5 refused.

Charge number 2 given is as follows: "2. If the drain

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had been constructed, and the water was flowing through the same from plaintiff's land, and the drain passed near the barn and barn-yard situated upon the land as purchased by the defendant, you may infer from such facts that the defendant, at the time of his purchase from his father, had knowledge of the rights of the plaintiff to maintain and flow the water from his own land through said drain."

The fifth charge asked and refused is as follows: "5. The existence of the ditch upon the land, when it was purchased by the defendant, is not sufficient notice to him that the plaintiff, or any one else, had or held any right to keep and maintain the same."

We think there was no error in this action of the court. It will be observed that the court only told the jury that they might infer notice to the defendant from the existence and use of the ditch, not that they were bound to do so, or that the inference or presumption was conclusive. If the fact of notice was material, and, in fact, the defendant had not such notice, he might have met the inference or presumption to be drawn from such facts by counter evidence.

This was an artificial watercourse, of considerable width and depth, passing near the buildings on the land, and was intersected by smaller ditches coming from the lands of the plaintiff, and, we think, in the absence of anything to the contrary, it might be fairly presumed therefrom that the defendant had notice of such facts, and of the plaintiff's rights, at the time of his purchase. *Paul v. The Connersville, etc., R. R. Co.*, 51 Ind. 527.

These are all the questions which are made by counsel in their briefs.

The judgment is affirmed, with costs.

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LEE, ADM'R, v. CARTER.

**PRACTICE.**—*Overruling Motion for Rejection of Pleading.*—*Record.*—The action of a court in overruling a motion to reject a pleading filed cannot be presented to the Supreme Court when the motion is not in the record, or when the ruling has not been reserved by a bill of exceptions.

**CONTRACT.**—*Agreement to Insert Provision in Will.*—Where services have been rendered by one under a verbal agreement by which, in consideration of such services, another had promised to insert a provision in his will, whereby he would devise and bequeath certain property to the person by whom such services were to be rendered, an action will lie against the administrator of the estate of the person so agreeing to make such provision in his will, for the breach of such agreement.

**ADMINISTRATOR.**—*Estoppel.*—Where an administrator is sued, as such, for the recovery of a money judgment against the estate represented by him, he cannot, in such action, set up an estoppel to protect his title to real estate under a purchase thereof made by him in his individual capacity from the heirs-at-law of his decedent.

From the Bartholomew Circuit Court.

*F. T. Hord*, for appellant.

*S. Stansifer* and *R. Hill*, for appellee.

BUSKIRK, J. —The record shows that appellee filed his claim, in the clerk's office of Bartholomew county, against the estate of George Cline, deceased, which was duly sworn to, as required by law.

The appellant filed a written motion to strike out certain parts of the first paragraph of the complaint, but before any ruling was had thereon, the motion was withdrawn, and a demurrer to such paragraph was filed, which was sustained.

The appellee asked and obtained leave to file an additional paragraph of complaint. Thereupon an amended complaint was filed, which was duly sworn to, as required by law. The amount claimed in the amended complaint is much larger than that claimed in the original complaint. We are informed by the clerk that the appellant filed a written motion to reject the amended complaint, that such motion was overruled, and an exception taken; but the motion is not in the record, and the question is not reserved by a bill of

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exceptions. A demurrer was filed and overruled to the first paragraph of the amended complaint, and an exception entered.

The appellant answered in five paragraphs. A demurrer was sustained to the fourth, to which ruling an exception was taken. Reply in denial to the second, third and fifth paragraphs, and an affirmative reply to the third. Trial by jury; verdict for appellee; motion for a new trial overruled; judgment. The evidence is not in the record.

The errors assigned are:

1. That the court erred in overruling the motion to strike out parts of the first paragraph of the complaint.
2. That the court erred in overruling the motion to reject the amended complaint.
3. That the court erred in overruling the demurrer to the first paragraph of the amended complaint.
4. That the court erred in sustaining the demurrer to the fourth paragraph of the answer.

The motion to strike out parts of the first paragraph of the complaint was not ruled on, but was withdrawn. No question is presented.

We have seen that the motion to reject the amended complaint is not in the record; hence, we cannot determine upon what it was based, and must presume that the ruling of the court below was correct.

Besides, if the motion itself was in the record, the ruling of the court thereon is not reserved by a bill of exceptions. That this is indispensably necessary is settled by a long line of decisions. *Anthony v. Lewis*, 8 Ind. 339; *Adkins v. Hudson*, 11 Ind. 372; *Greer v. Studabaker*, 14 Ind. 519; *Vanhouten v. Vagen*, 22 Ind. 274; *Davis v. Warfield*, 38 Ind. 461; *Lynch v. Jennings*, 43 Ind. 276; *Dobell v. Bradley*, 47 Ind. 263. In the case last cited, it was held that the action of the court in overruling a motion to strike out part of a pleading cannot be presented to the Supreme Court when the question has not been reserved by bill of exceptions.

We proceed to inquire whether the court erred in over-

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ruling the first paragraph of the complaint, which avers, substantially, that, in 1837, appellee and George Cline, deceased, agreed that appellee should take possession of and reside on said Cline's land, amounting to one hundred and sixty acres, lying in Bartholomew county; that appellee should clear and improve such portions as he might be able to do, and appellee should permit said Cline to reside with him, doing his mending, washing and boarding; and said Cline promised to compensate plaintiff by a provision in his will, whereby he would devise to appellee said one hundred and sixty acres; that, in 1837, appellee took possession of the land, cleared about one hundred acres, built fences, dwelling-house, stable and other out-houses thereon, and permitted Cline to reside in his family; and he resided on said Cline's land until 1857, when appellee's wife died, and he broke up house-keeping, when Joseph Carter went to the farm, and he continued there until 1869, when he died; and about the 1st day of August, 1869, said Cline, deceased, again requested appellee to resume the relations first existing between himself and decedent, and agreed that if he would, he (Cline) would compensate appellee therefor by a provision in his will, which he promised to execute, whereby he would devise all of his property, real and personal, to appellee, or his children in the event he should survive appellee. And appellee resumed the relations theretofore existing between them; and on the 9th of August, 1872, Cline departed this life, without making any will, and without compensating appellee for his services. That the value of the real estate was eight thousand dollars, his personal property six hundred dollars, and the value of his services was ten thousand dollars, for which he demands an allowance.

The question presented is not a new one in this court.

In *Bell v. Hewitt's Executors*, 24 Ind. 280, this identical question was presented, and it was there held that services rendered under an express agreement that they were to be compensated by a provision to be inserted in the will of the party for whom they were rendered, were a sufficient con-

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sideration for such promise, and that the promise alleged upon that consideration made a valid contract, not affected by the statute of frauds, for a breach of which an action arises, as in any other case of breach of contract.

The ruling in the above case is in entire accord with the decided weight of authority in other states. We cite the following cases as fully supporting the ruling in this State: *Jacobson v. Executors of LeGrange*, 3 Johns. 199; *Patterson v. Patterson*, 13 Johns. 379; *Martin v. Wright's Adm'rs*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576; *Robinson v. Raynor*, 28 N. Y. 494.

The last question arising in the record is, whether the court erred in sustaining a demurrer to the fourth paragraph of the answer.

This answer avers, substantially: "For answer to all of plaintiff's demand in excess of six hundred dollars, says that George Cline died, the owner of the land described, which descended to his only heirs, John Cline and William Cline." That the appellee in this action, immediately after the death of said George Cline, entered into a negotiation with the said heirs for the purchase of said real estate, and represented and stated to said heirs that the entire indebtedness of said estate was very small, and would not exceed the value of the personal estate of said decedent, and that he, the appellee, would agree to take said personal estate and pay all the indebtedness of said Cline, deceased. That the said heirs informed this defendant of the statements thus made by the appellee, and the appellant thereupon, relying on the said statements so made by appellee, and believing them to be true, and having no knowledge whatever of the indebtedness against the estate of said Cline, and having no reason to believe that the statements made by appellee were not true, and being ignorant of plaintiff's claim, believed the said heirs of said Cline could convey a perfect title to said premises free and clear from the indebtedness of said decedent and appellee, and appellant entered into negotiations for the

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purchase of said real estate with said heirs, and he purchased the same for a large sum, to wit, eight thousand dollars, and the same was conveyed by said heirs to appellant, who now owns and possesses the same on his own personal account. That appellant was induced to make said purchase by the said statements of appellee that said estate was not indebted. That appellee, as appellant well knew, had resided for many years with the decedent, and had the management, during all of said time, of Cline's affairs, and was perfectly acquainted with the condition of his estate, and the amount of his indebtedness, and the amount of his personal estate, while appellant had no knowledge whatever of the affairs or indebtedness of said decedent. That the personal property of said decedent does not now, and did not at his death, exceed six hundred dollars in value, of which appellee well knew, and whatever allowance plaintiff may recover in this action, in excess of said sum of six hundred dollars, must be made by the sale of the said real estate so purchased and now owned by the appellant; wherefore appellee is estopped to assert any claim in excess of said six hundred dollars.

Two questions are presented: 1. Do the facts above stated work an estoppel? 2. This being an action to recover a money judgment against the estate of the decedent, can the administrator of such estate set up an estoppel in his favor in his individual capacity?

Having arrived at the conclusion that the appellant, when sued as administrator, and when the only question to be decided was whether the estate of the decedent was indebted to the appellee, cannot set up an estoppel to protect his title under the purchase from the heirs at law of the decedent, we will not now consider and decide whether the facts averred in the fourth paragraph of the answer constitute a valid estoppel. It will be time enough to decide such question when it arises and is essential to the decision of the cause.

We think the court committed no error in sustaining the demurrer to the fourth paragraph of the answer.

The evidence not being in the record, no question is pre-

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sented as to the action of the court in overruling the motion for a new trial.

We find no error in the record.

The judgment is affirmed, with costs.

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CHOEN v. THE STATE.

NAME.—*Christian Name.*—*Initial Letters.*—*Criminal Law.*—The law knows and recognizes as applicable to a person but one Christian name, and if, in a criminal prosecution for an assault and battery, in stating the name of the person injured, in charging the offence, one Christian name be properly stated, and the initial letter of another Christian name be inserted, such initial letter will be regarded as surplusage, and it will be sufficient to prove the Christian name as stated, with the surname, and without such initial letter.

From the Cass Circuit Court.

*D. C. Justice*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

WORDEN, J.—The appellant was prosecuted before a justice of the peace upon an affidavit charging him with having perpetrated an assault and battery upon George W. Shott. The cause was tried before the justice by a jury, where the appellant was found guilty. He appealed to the circuit court, where the cause was again tried by a jury, the trial again resulting in a verdict of guilty. Judgment on the verdict, a motion for a new trial having been overruled.

No question is made here, except as to the sufficiency of the evidence to sustain the verdict. Upon an examination of the evidence, we think it fairly sustains the verdict. Two juries have arrived at the same conclusion upon the question of the appellant's guilt, and we can by no means say, from an examination of the evidence set out in the record, that a wrong result has been reached.

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There is, however, one particular in which the appellant especially claims that the evidence was defective. The evidence did not show that the name of the person assaulted and beaten was George W. Shott, as alleged, but George Shott. It is insisted by the appellant that, as the name was alleged to be George W. Shott, the proof should have corresponded with the allegation, and that the omission or failure to prove the initial letter "W" of the middle name was fatal.

We recognize the rule that where matters of description are alleged, though unnecessarily, they must be proved. *Wertz v. The State*, 42 Ind. 161. But a majority of the court are of opinion that the rule has no application to such case. The law, in the opinion of a majority of the court, knows but one Christian name, and where one Christian name is stated, and also the initial letter of another Christian name, as in this case, the initial letter may be rejected as surplusage, and need not be proved. These views are sustained by the following authorities:

*Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardiner*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102; *The People v. Cook*, 14 Barb. 259, 307; *Dilts v. Kinney*, 3 Green, N. J. 130; *Thompson v. Lee*, 21 Ill. 242; *Erskine v. Davis*, 25 Ill. 251; *Bletch v. Johnson*, 40 Ill. 116; *Isaacs v. Wiley*, 12 Vt. 674; *Allen v. Taylor*, 26 Vt. 599; *Hart v. Lindsey*, 17 N. H. 235; *Keene v. Meade*, 3 Pet. 1; *State v. Martin*, 10 Mo. 391; *Edmundson v. The State*, 17 Ala. 179; *McKay v. Speak*, 8 Tex. 376; *The State v. Manning*, 14 Tex. 402; *The People v. Lockwood*, 6 Cal. 205; *Bratton v. Seymour*, 4 Watts, 329. We are aware that the cases of *Price v. The State*, 19 Ohio, 423, and *The State v. Hughes*, 1 Swan, Tenn. 261, would seem to be at variance with the views above expressed, but we are satisfied that the decided weight of authority sustains the proposition stated.

If the law knows more than one Christian name, it would seem to follow necessarily that where a man bears more than

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one, they must all be stated in naming him; otherwise there would be a variance. Yet it would perhaps be safe to say that no respectable authority can be found holding it necessary, in naming a third person, as the person assaulted in this case, to state more than one Christian name. Again, if the law knows more than one Christian name, it would seem to follow that in naming a person who bears more than one, in such a pleading, the names should all be stated in full. The stating of one Christian name, if the law recognizes more, with initial letters for the residue, would seem to be no better than giving merely the initials of all the Christian names. If a person has but one Christian name, it will not do to state the initial letter of that merely, but the name must be stated in full. So, if he has more than one Christian name which the law recognizes, it would not do to state one of them merely and give the initials of the others.

On the other hand, if the law knows but one Christian name, and that is properly stated, the initial letter or letters, standing for other Christian names, of which the law takes no cognizance, if inserted, may be regarded as surplusage, and it will be sufficient to prove the Christian name as stated, with the surname.

The judgment below is affirmed, with costs.

PETTIT, J., dissenting. The charge is, that the assault and battery was committed on George W. Shott, but the proof is that it was committed (if at all) on George Shott. The question is, was the proof sufficient? I think it was not. The name of the injured party must be proved as alleged. 1 Greenl. Ev., secs. 65 and 67; *Rex v. Craven*, Russ. & Ry. 14; *Rex v. Deeley*, 1 Moody, 303; *Rex v. Owen*, 1 Moody, 118; *The State v. Vittum*, 9 N. H. 519; *Price v. The State*, 19 Ohio, 423; *The State v. Hughes*, 1 Swan, Tenn. 261; *McLaughlin v. The State*, ante, p. 279.

WELLING v. MERRILL ET AL.

REPORTS OF SUPREME COURT.—*Price*.—The limitation fixed by the act of March 13th, 1875, of the price at which the reports of the Supreme Court of Indiana published under that act may be sold by others than the reporter is valid; and no more than three dollars per copy can be recovered for such reports by any seller thereof, though the buyer may have contracted to pay a higher price.

From the Marion Superior Court.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for appellant.

*C. Baker*, *O. B. Hord*, *A. W. Hendricks* and *J. B. Black*, for appellees.

WORDEN, J.—Welling bought of Merrill & Co. thirteen copies of the forty-ninth volume of Indiana Reports, prepared and published since the taking effect of the act of March 13th, 1875 (Acts 1875, Reg. Sess., 126), hereinafter noticed, at the rate of four dollars and fifty cents per copy, for the amount of which he gave them his note, on which this action was brought. Answer setting up the facts and claiming a want of consideration to the extent of one dollar and fifty cents per copy.

The question arising in the record is, whether Merrill & Co. were authorized under the law to sell the reports at a price greater than three dollars per copy. The court below held that they were, and they were allowed to recover the full amount of the note.

The statute above mentioned provides, that the reporter “shall be entitled to receive, for every volume of the size and description hereinbefore provided, such price as may be agreed upon between such reporter and the purchaser, not exceeding three dollars per volume, and it shall not be lawful for him to receive directly or indirectly, or for any other person to demand or receive any greater price per volume.”

Substantially the same provision is found in the act of 1852 (1 G. & H. 536, sec. 7), and in that of 1865 (3 Ind.

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Stat. 430, sec. 7), except that in the latter act the price fixed is four dollars and fifty cents per volume.

In the case of *Black v. Merrill*, 51 Ind. 32, we have decided that the reporter is bound by the provision of the statute limiting the price, because he must be deemed to have assented thereto by publishing the reports under and by virtue of the provisions of the act.

The limitation as to price, it will be seen, applies to sales made by any other person, as well as to those made by the reporter.

Does any other person who may sell the reports stand in a different situation from that occupied by the reporter, in respect to the question involved? We are of opinion that he does not.

The reports were brought into existence under and by virtue of the statute, which confers upon the reporter the use of the manuscript opinions, briefs and papers, and the right of the State to procure copyrights, and limits the price at which he or any other person may sell them. It was the intention, and within the power of the legislature, while it gave these privileges to the reporter, thus furnishing him facilities for preparing the reports which are enjoyed by no one else, and thus enabling him to secure a monopoly therein by means of copyrights, to limit the price at which they should be sold. The legislature, doubtless, deemed it necessary to limit the price at which others than the reporter should sell the reports, lest, notwithstanding the limitation upon the reporter, the price at which they might be held in the book markets should make them unreasonably expensive to those who might need them.

The reports in question could have had no existence but for the law under which they were produced, and the same law fixes the price. Reports, to be sure, might have been produced without the law, but not those in question. Reports might have been published by private persons without the facilities and advantages conferred upon the reporter, and they would not be governed by the law in question,

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because not produced under it. The law is a public one, which every person is bound to notice.

No person can have the title to a book or other property thrust upon him without his consent. If he take the title to these reports, whether by purchase or otherwise, knowing, as he must, the limitation attached to the price at which he may sell them, he must be deemed to consent to the limitation, and he takes the property subject thereto. The limitation follows the property into whosoever hands it may fall, because that is a part of the law of its creation and being, and all persons taking it must take it subject to that law.

The law is entirely different from one in which the legislature should assume to fix the price of property not to be created or brought into existence under the law fixing the price, but property generally, as a bushel of wheat, a pound of butter, or a volume of reports.

Here the legislature have provided for the production of certain property, the reports, which may or may not be produced, at the option of the reporter, who is not bound to act as such unless he choose, and which may or may not be bought or sold by or to any one, as he may choose, and fixing the maximum price at which the property may be sold, if produced and sold. We cannot say that the law violates any provision of the constitution, or that it is for any other reason void.

Pennsylvania has a similar statute fixing the price of the reports, however at four dollars per volume, making it a penal offence for the reporter or his vendee, or any other person, to sell for a higher price, and subjecting the party offending to a penalty of two hundred dollars. 2 Brightly's Purdon's Digest, 1339. We are not advised whether any question has arisen in the courts of Pennsylvania under this provision of their statute. We quote, however, as having a bearing upon the question, the following passage from the opinion of the court, as delivered by BLACK, C. J., in the case of *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 147, 161:

“We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we can find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

“The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied, for the faithful execution of them, on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary.”

We are of opinion that the judgment of the court below was wrong, and must be reversed.

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Welling *v.* Merrill *et al.*

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The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

PETTIT, J., dissents.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The argument on petition for a rehearing places the Indiana Reports, as books, upon the same footing with the commodities of general commerce; as if the State had no more power over them than over the ordinary products of industry, or could no more regulate the price and sale of them than it could the general articles of trade. This is ingenious, but it is not sound. In the first place, the State owns the public records of the Supreme Court, out of which the books are made. These records are subject to the legislative will. The State may regulate the manner in which they shall be produced, preserved, reported, and published, either in manuscript, as transcripts of the records, or in printed volumes, and may regulate the price of them per volume in printed books, as well as it may fix the fees of an officer in each individual case for producing a transcript of them. We can see no difference, in principle, between regulating the price the reporter shall receive for a printed volume of reports, and fixing the fees the clerk shall have for a manuscript copy of the same decisions. The reporter is as much an officer of the law as the clerk. His office is created, and his duties prescribed, by law. He accepts it with a full knowledge of its obligations, emoluments and burdens. He has no more power to charge a higher price than that fixed by law for the books which the law authorizes him to produce, and aids him in producing, than the clerk has to charge more fees than the law allows him for the transcripts of the same matter.

But it is urged, that, although the legislature may fix the price of the reports as to sales made by the reporter—indeed the point is quite conceded—yet it cannot regulate

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Welling *v.* Merrill *et al.*

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the price in the hands of the bookseller. This argument is more plausible than solid. It were, indeed, in vain to restrict the price of the books as to the official reporter, and allow the unofficial bookseller to charge what he pleased for them. This would defeat one of the main objects of the act, namely, to bring the law, as interpreted by the highest tribunal in the State, to the profession, and before the people, as widely and cheaply as practicable. Besides, if the law allowed every unofficial person to make trade and merchandise of the reports, and charge whatever price they could get, while the official reporter was restricted to the price fixed by law, it would be unjust to that officer, who is entitled to the copyright. As well allow unofficial persons to go into the clerk's office, copy the records at will, and sell the transcripts for any price they could get. No doubt, any person could print and publish and sell the reports of the decisions of this court, by purchasing the transcripts of them from the clerk, but they could not legally obtain them in any other way. It is plain, then, that the fixed price of the reports must be maintained in the hands of all persons, or one of the most beneficial purposes of the law would be defeated. We think it is as much within the power of the legislature to fix the price of the reports published by the official reporter, as it is to fix the amount of the fees or the salary of any other public officer; and all persons must be held to know and obey the public regulation. Neither the official reporter nor the unofficial bookseller has any right to complain; for they can both see it written in the statute book—the one before he undertakes to manufacture the book, and the other before he undertakes to sell it—that the reporter “shall be entitled to receive, for every volume of the size and description hereinbefore provided, such price as may be agreed upon between such reporter and the purchaser, not exceeding three dollars per volume, and it shall not be lawful for him to receive directly or indirectly, or for any other person to demand or receive any greater price per volume.”

The petition is overruled.

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The State, *ex rel.* Attorney General, *v.* Giles.

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THE STATE, EX REL. ATTORNEY GENERAL, *v.* GILES.

DEMURRER.—*Harmless Error*.—There can be no available error in sustaining a demurrer to a special paragraph of reply, where all the evidence admissible thereunder is admissible under a remaining paragraph of general denial.

STATUTE OF LIMITATIONS.—*Concealment*.—*Pleading*.—To an answer of the statute of limitations, a reply which relies on the defendant's concealment of his liability to an action must allege the acts of concealment, as mere silence does not amount to the concealment contemplated by the statute, 2 G. & H. 162, sec. 219.

From the Sullivan Circuit Court.

C. A. Buskirk, Attorney General, for the appellant.

DOWNEY, C. J.—This was an action by the appellant against the appellee, who had been treasurer of Sullivan county, to recover certain moneys, which, it is alleged, he had received in his official capacity, belonging to the school fund. A part of the amount was received by the treasurer for licenses to retail spiritous liquors, and the residue was for interest on school funds. It is alleged that the defendant was such treasurer from the 9th day of August, 1863, to the 9th day of August, 1867; that a demand was made by the relator upon the defendant, for the money, on the 1st day of January, 1874; and that he refused to pay the same, and had not paid the same, to his successor in office as treasurer.

The defendant answered:

1. A general denial.
2. That his term of office expired on the 10th day of August, 1867, at which time he had a full, complete and final settlement with his successor in office, as such treasurer, for all public moneys in his hands, or with which he was in any wise chargeable, including the funds mentioned in the complaint and bill of particulars, and then, and upon the request of his successor, paid to him all such moneys.
3. That the cause of action did not accrue within six years before the commencement of this action, and that the same is barred by the statute of limitations.

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The Indianapolis, Bloomington and Western Railway Co. *v.* Reed *et al.*

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Reply: 1. General denial of all the paragraphs of the answer.

2. To the second paragraph of the answer, admitting the settlement, but alleging a mistake, by which the matters in the complaint mentioned were omitted and not settled.

3. To the third paragraph of the answer, admitting that six years had elapsed since the plaintiff's cause of action accrued, but alleging that the defendant concealed the fact that he had received the said several sums of money mentioned in the complaint, and so kept said facts concealed until one year next before the commencement of this suit.

The defendant demurred to each of the second and third paragraphs of the reply, on the ground that neither of them stated facts sufficient to constitute a reply. The demurrers were sustained, and there was final judgment for the defendant. The sustaining of the demurrers is the error assigned.

There was no available error in sustaining the demurrer to the second paragraph of the reply, for the reason that, if there was a mistake in the settlement, it might have been shown under the general denial contained in the reply.

We think, also, that there was no error in sustaining the demurrer to the third paragraph of the reply. There are no acts of concealment alleged in the reply. Mere silence of a party does not amount to such concealment as is contemplated by the statute. The acts of concealment should be set out in the pleading. *Stanley v. Stanton*, 36 Ind. 445, and cases cited.

The judgment is affirmed, with costs.

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THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAIL-  
WAY CO. *v.* REED ET AL.

RAILROAD.—*Assessment of Damages to Land-Owner.*—A proceeding to assess against a railroad company damages sustained by a land-owner from the appropriation of his land for the construction of the railroad of such com-

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pany cannot be maintained by such owner, under sec. 15, 1 G. & H. 509, where there has not been an instrument of appropriation filed by the company, as provided in said section.

From the Fountain Common Pleas.

*J. C. Black, L. Nebeker and S. M. Cambern, for appellant, Tipton & Miller, for appellees.*

PETTIT, J.—This was an attempt by the appellees, under the fifteenth section of the act of May 11th, 1852, 1 G. & H. 509, to assess damages against the appellant for the construction of its road over and through the lands of the appellees. The railroad company had not fixed [filed] any instrument of appropriation, and until that was done the land-owners could not take any steps under the acts above cited. Its very terms preclude such a construction. The demurrer to the petition should have been sustained, as also the motion to dismiss the proceedings. We have a statute, 2 G. & H. 315, sec. 706, etc., under which either party may have an assessment of damages, but the proceedings under the two statutes are very different. Under the former, three appraisers are to be appointed, who are to act, etc.; while under the latter, there is to be a jury empanelled, of not less than six or more than twelve, sworn by the sheriff, etc.

The judgment is reversed, at the costs of the appellees, with directions to sustain the demurrer to the petition, and to dismiss the case.

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RUBLE v. THE STATE.

CRIMINAL LAW.—*Reformatory Institution for Women and Girls. — Instruction to Jury.*—The penal department of the Indiana Reformatory Institution for Women and Girls was not intended as a substitute for the state prison and the county jails, for female convicts over fifteen years of age, but only as a substitute for the state prison for such convicts. It was, therefore, error to charge the jury, on the trial of a woman for murder,

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after the opening of said penal department for the reception of female convicts, that in case of the conviction of the defendant of manslaughter, the penalty was at least two years' imprisonment in the penal department of said reformatory institution, omitting to charge that the jury might, in their discretion, imprison the defendant in the county jail at hard labor, under the direction of the jailor.

From the Decatur Circuit Court.

*W. A. Moore* and *C. & J. K. Ewing*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

WORDEN, J.—The appellant, Mary Ruble, was indicted in the court below for the crime of murder, and, upon trial by jury, was convicted of manslaughter, and sentenced to imprisonment in the penal department of the female prison and reformatory institute for girls and women, for the period of two years.

The court charged the jury that the penalty, in case of a conviction, was at least two years' imprisonment in the penal department of the reformatory institute for women, omitting to charge that the jury might, in their discretion, imprison the defendant in the county jail, at hard labor, under the direction of the jailor. The charge was excepted to by the defendant.

The general penalty for manslaughter is imprisonment in the state prison, not more than twenty-one, nor less than two years. 2 G. & H. 438, sec. 8. It is provided, however, in section 57, p. 454, that "upon the conviction of any female of any crime or offence specified in this act, the punishment for which is confinement in the State's prison, she may, instead of such punishment, be imprisoned at hard labor in the jail of the county, under the direction of the jailor."

The sixteenth section of the "act to establish a female prison and reformatory institution for girls and women," etc. (Acts 1869, p. 61-65), provides, that "after the penal department of said institution shall have been proclaimed open for the reception of female convicts as hereinbefore provided, it

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shall not be lawful for any court to sentence any female convict to the state prison upon conviction of any crime, but thereafter every female convict shall be sentenced to imprisonment in the penal department of the institution created by this act, and the term of imprisonment for which such female convict may be sentenced, shall be any period of time for which she might, on conviction, have been sentenced to the state prison, at and prior to the passage of this act."

Section 18 of the act is as follows:

"Nothing in the provisions of this act contained shall be so construed as to prevent any court, upon the conviction of any woman or any girl over fifteen years of age, of any criminal offence, from sentencing such convict to imprisonment in the county jail of the proper county, under the provisions of any law in force in this State prior to and at the time of the taking effect of this act."

It is clear, taking sections 16 and 18, above quoted, together, that the legislature did not intend that the female prison should be a substitute for the state prison and the county jails for female convicts over fifteen years of age, but only a substitute for the state prison. It was still left discretionary to imprison such female convicted of crime in the proper county jail, wherever it might have been done under the law as it stood before the passage of the act in question. It results that a woman convicted of a crime, which formerly would have subjected her to imprisonment in the state prison or the county jail, may now be imprisoned in the "Indiana reformatory institution for women and girls," or the county jail. As the jury fixes the punishment, where the cause is tried by a jury, they must, in such case, determine where the imprisonment shall take place.

We think the court erred in giving the charge, as from it the jury might well have inferred that the appellant could only be imprisoned in the Indiana reformatory institution for women and girls. The jury should have been informed that, upon the conviction of the accused, they might determine that she be imprisoned in the penal department of the

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Indiana reformatory institution for women and girls, or at hard labor in the jail of the county, under the direction of the jailor.

There are some other questions made in the case, but we pass them over, as they may not arise upon another trial of the cause.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for a return of the prisoner.

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FLOYD COUNTY.

52	361
155	447
52	351
171	358
171	311

**DOMICIL.—Taxation.**—In the provision of the assessment law, that “all personal property owned by persons residing within this State, whether it is in or out of this State, and all personal property within this State, owned by persons not residing within this State, subject to the exceptions hereinafter stated, shall be subject to taxation,” 1 G. & H. 69, sec. 3, the word “residing” has reference to fixed and permanent domicil, and not to temporary or transitory residence.

**SAME.**—A person can have but one domicil at a time, and cannot lose one until he has acquired another.

**SAME.—Temporary or Indefinite Absence from Domicil.**—A person whose domicil, for many years prior to August, 1870, had been in this State, where he owned a dwelling-house, then rented the same, with the furniture thereof, for an indefinite time, three months’ notice being required to terminate the lease, and, in company with his family, left this State and went to Europe, with the intention of ceasing to be a resident of Indiana for an indefinite time, and with the expectation of again becoming a citizen of Indiana at some indefinite time in the future, probably two or three years. In November, 1872, he and his family returned from Europe, where they had lived in the meantime, to Indiana, and resumed possession of said dwelling-house, where they continued to reside.

**Held,** that said person was taxable for the years 1871 and 1872, as a person “residing within this State.”

From the Floyd Circuit Court.

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Culbertson v. The Board of Commissioners of Floyd County.

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*G. V. Howk* and *W. W. Tuley*, for appellant.

*J. H. Stotsenburg*, for appellee.

BUSKIRK, J.—In March, 1873, the appellant presented his petition to the board of commissioners of Floyd county, the appellee, under the provisions of an act entitled “an act requiring county commissioners to perform certain duties in relation to the refunding of taxes wrongfully assessed and collected,” approved March 2d, 1853. 1 G. & H. 110. The objects of the petition were to obtain the refunding of certain taxes, assessed against the appellant, for the year 1871, and paid for him without his knowledge or consent, and also to obtain the abatement of certain other taxes assessed against him for the year 1872.

The prayer of the petition was denied by the appellee, and an appeal was taken from its decision to the court below. The cause was submitted to the court below for trial, upon an agreed statement of facts, and a finding was made in favor of appellant, but in a merely nominal amount, and to a very limited extent. To so much of the finding of the court below as was adverse to the prayer of his petition, the appellant at the time excepted.

The agreed statement of facts is as follows:

“Prior to the 8th day of August, 1870, the said John C. Culbertson resided in the city of New Albany, Indiana. He had resided there for about thirty years from choice. He was not born in Indiana. In August, 1870, he had no occupation or business of any kind. He lived upon an income derived from the rents of real estate, bank stocks and money loaned. He had a dwelling-house on Bank street, in New Albany, which he occupied with his family, consisting of his wife and two children, until the 8th day of August, 1870.

“On the said 8th day of August, 1870, he relinquished the possession of his house to one Conn, having rented the same to him, with all the furniture therein, in consideration of a rental of three hundred and fifty dollars per annum,

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payable quarterly, and agreeing to give said Conn three months' notice before requiring him to vacate the premises. No time was fixed for the determination of the lease, other than as above stated.

"On the same day, with the intention of ceasing to be a resident of Indiana for an indefinite time, he departed from Indiana, with all the members of his family, for the purpose of residing in Europe, with the expectation of again becoming a citizen of Indiana at some indefinite time in the future, probably two or three years.

"The person Conn, who from that day occupied the dwelling-house and used the furniture, was not in any manner related to said Culbertson or his family, and no room was reserved therein; neither was the furniture therein reserved for them.

"While Culbertson and his family were in Europe, and in December, 1870, some four months after he left, he wrote a letter to his brother, William S. Culbertson, a merchant of New Albany, which contained the following:

"'They of course will only tax me upon my realty this year, as I have ceased to be a citizen for a year or two, and as life is uncertain, may never become one again.'

"Culbertson and his family rented part of a furnished house in London during August, September and a portion of October, 1870, wherein he and his family regularly kept house during that period.

"They then travelled from place to place on the Continent, and after living in Europe for two years and a quarter nearly, in August, 1872, he notified said Conn that he would require him to vacate his house in November following. He returned with his family in November, 1872, to New Albany, and from that time to March, 1873, they resided in New Albany.

"Between August 8th, 1870, and their return from Europe, neither Culbertson nor any member of his family was in the United States, and during part of the time the children were at school in Europe.

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“On January 1st, 1871, Culbertson owned real estate in New Albany township, in which the city of New Albany is situated, and corporation stocks of the fair value of twenty-three thousand three hundred and ninety dollars.

“He also owned furniture in the house held by Conn of the value of one thousand three hundred and eighty-seven dollars.

“Besides the realty and furniture, he had intangible personal property, to the amount of forty-seven thousand two hundred and eight dollars. Of this sum, one thousand five hundred and eight dollars was on deposit in London, England, and upon his person in Europe, and the residue, forty-five thousand seven hundred dollars, consisted of three thousand seven hundred dollars, deposited in a New Albany bank, and forty-two thousand dollars loaned at interest to the New Albany Woolen Mill Company, a corporation organized and doing business in New Albany township, outside of New Albany.

“Culbertson did not list, nor did any one for him, at his instance or request, list any of said personalty. The assessor for the year 1871, not finding him or any one for him to leave a list with, put down an assessment of his personalty for 1871 by copying that of 1870 and returned the same, without the knowledge or aid of said Culbertson. The assessment so made and returned by the assessor was similar in amount and description to the realty and personalty actually owned by the said Culbertson on January 1st, 1871.

“In March, 1872, the cashier of the brother of said Culbertson, without his direction, knowledge, consent or subsequent ratification of the act, paid eight hundred and eighty-one dollars and fifteen cents, the amount of tax for state and county purposes for 1871, which had been assessed as above described, to the treasurer of Floyd county.”

Upon the foregoing facts, two questions were submitted to the court below for its decision, and, by the exceptions saved, the same questions are fairly presented by the record

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of this cause for the consideration of this court. These questions may be thus stated:

1. Was the appellant, upon the 1st day of January, 1871, or upon the 1st day of January, 1872, upon the facts admitted, a person "residing within this State," within the meaning of those words, as the same are used in the third section of the assessment law, approved June 21st, 1852, 1 G. & H. 69?

2. If the appellant, upon the said days, upon the facts admitted, was a person "not residing within this State," within the meaning of those words, as used in said third section, then, was the personal estate of the appellant, to the amount of forty-seven thousand two hundred and eight dollars, consisting of moneys on his person and on deposit, and money loaned to a corporation of this State, "personal property within this State," within the meaning of those words, as the same are used in said third section?

In the court below, the first of these questions was decided in favor of the appellant, the court holding, upon the facts admitted, that the appellant, during the years 1871 and 1872, was not a person "residing within this State," within the meaning of those words, as used in said third section.

No exception was taken to this ruling by the appellee, but the court held that the appellant was liable to be taxed as a non-resident of the State upon all personal property within this State. To this ruling the appellant excepted, and now assigns it for error here, and such assignment presents for decision the question of whether the appellant was a resident or a non-resident of this State, upon the agreed facts, from August, 1870, to November, 1872. The liability of the appellant to be taxed is regulated by the third section of the assessment law, approved June 21st, 1852, which reads as follows:

"Sec. 3. All real property within this State, and all personal property owned by persons residing within this State, whether it is in or out of this State, and all personal property within this State, owned by persons not residing within

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this State, subject to the exceptions hereinafter stated, shall be subject to taxation." 1 G. & H. 69.

By the above section, a broad and well defined distinction is drawn between residents and non-residents of the State. A resident of the State is taxable upon all the personal property which he may own, whether it is within or without this State. In such case, the *situs* of the property does not affect the question of its taxation.

Under the second clause of said section, "all personal property within this State, owned by persons not residing within this State," is subject to taxation. In the first case the residence of the owner, and in the second the *situs* of the property, gives the right to tax. In the one case the owner must reside within this State, and in the other the property must be situated within this State. If, therefore, the appellant was a resident of this State on the first days of January, 1871 and 1872, all the property owned by him, whether it was within this State or in Europe, was subject to taxation. If, upon the other hand, the appellant was a non-resident of this State, during such years, then he was only subject to be taxed upon such portion of his personal estate as was actually within this State. *Rieman v. Shepard*, 27 Ind. 288; *Riley v. The Western Union Tel. Co.*, 47 Ind. 511.

It is quite obvious that the decision of the case in judgment must depend upon whether the appellant was a resident of this State at the times when said taxes were assessed. The word used in the third section of the assessment law is "residing." In what sense was that word used? The word "domicil" is not used in our constitution. The words "inhabitant" and "resident," "reside" and "resided," are used as synonymous. In section 2 of article 2, in defining who shall be voters, the words "resided" and "reside" are used. In section 7 of article 4, in prescribing the qualifications of senators and representatives, the word "inhabitant" is used. Section 7 of article 5, in defining the qualifications of Governor and Lieutenant Governor, uses the word "resident." Sections 3 and 9 of article 7 require the Supreme

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and circuit judges to "reside" within their respective districts and circuits. Section 4 of article 6, in defining the qualifications of county officers, uses the word "inhabitant." The same use of these words will be found in our statute. We think that the word "residing," as used in the third section of the assessment law, was intended to convey the idea of a fixed and permanent residence, and not a temporary or transitory place of abode.

It is fully shown by the facts agreed upon, that the domicil of the appellant had been, for many years prior to August, 1870, in New Albany, Indiana; that he owned a dwelling-house therein, which he rented, with the furniture, for an indefinite time, three months' notice being required to terminate the lease; and that he and his family left this State, with the intention of remaining in Europe for an indefinite time.

The controlling question in the case is, whether, upon the agreed facts, the appellant changed his domicil and ceased to be a resident of Indiana. It is agreed that, "with the intention of ceasing to be a resident of Indiana for an indefinite time, he departed from Indiana, with all the members of his family, for the purpose of residing in Europe, with the expectation of again becoming a citizen of Indiana, at some indefinite time in the future, probably two or three years."

The case of *Sears v. City of Boston*, 1 Met. 250, is much like the case in judgment. The facts and finding were as follows:

Sears, a native inhabitant of Boston, intending to reside in France, with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure, he intended to return and resume his residence in Boston, but had not fixed on any time for his return. Prior to the assessment of the taxes for the current year, his agent in Boston delivered the following notice to the assessor:

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"The undersigned, as agent of David Sears, and in his behalf, informs you that Mr. Sears with his family removed from this city, and leased his mansion house, nearly a year since. He has ever since continued, and still continues, absent with his family. This notice is given to enable you, before the assessment of taxes for the current year, to understand that Mr. Sears will not consider himself chargeable with taxes as an inhabitant of, or resident in, Boston."

He returned in about sixteen months, and his family in about nine months afterwards. The court held that he continued to be an inhabitant of Boston, and that he was rightly taxed there during his absence, for his person and personal property. Chief Justice SHAW, in rendering the opinion of the court, said:

"Actual residence, that is, personal presence in a place, is one circumstance to determine the domicil, or the fact of being an inhabitant; but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicil, or whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of

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enjoying civil and political privileges, and of being subject to civil duties.

“Taking the facts as submitted to the court, in the present case, we are all of opinion that they indicate a casual and temporary departure of the plaintiff from his place of permanent abode, and that he still continued to be an inhabitant of Boston, liable to be taxed for his poll and personal property. Most of the circumstances point to Boston as the fixed place of his abode, and to Paris as a place of temporary residence. Here he was born and educated, and acquired his property. Here was his dwelling-house; and though leased during his absence, it was with the furniture, and for a very short term, so that his family establishment could be resumed on his return. But the very strong circumstance which characterizes this case is, that at the time of the plaintiff's departure, it was his intention to resume his residence in Boston. It indicates that Paris was a place of temporary and not of permanent abode, and that he did not relinquish his domicile, or cease to be an inhabitant of Boston. Had he returned to Boston a few days before a town meeting or an election, we think he would have had a right to attend and vote as an inhabitant, in the same manner as if he had not been absent. He would have been in the same situation, in this respect, as a soldier, or mariner, or other person temporarily absent from his home, for purposes of business or pleasure.

“The circumstance of the plaintiff's taking a house in Paris for one year—it not appearing he engaged, or that it was his intention to engage, in any business or occupation abroad—is not sufficient to control the other circumstances tending to show that Paris was a place of a temporary visit, and not a permanent residence; that he was there as a sojourner, and not as an inhabitant.”

It is quite plain, from the foregoing authority, that the appellant did not acquire a domicile in Europe. The questions arise, whether a person can have more than one domicile at the same time, and whether he can lose one until he

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has acquired another. In *Bulkley v. The Inhabitants of Williamstown*, 3 Gray, 493, the court say: "The general rule, and, for practical purposes, a fixed rule, is, that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this; that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicil. The fact and intent must concur. He must remove, without the intention of going back. The question here is, whether he can abandon one, without acquiring another, and we think it has always been held that he cannot. If he goes into another state, and returns for his family, his personal presence there, concurring with the intent, may fix his domicil there. But if he has not previously removed to the other state, he has not acquired a domicil there, or lost one here."

In *Lyman v. Fiske*, 17 Pick. 231, the court say: "It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place, which constitutes the principal seat of his residence, of his business, pursuits, connexions, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct."

We cite the following authorities, as sustaining the doctrine laid down in the foregoing cases: Note 1 to *French v. Lighty*, 9 Ind. 475; *Frost v. Brisbin*, 19 Wend. 11; *Haggart v. Morgan*, 1 Seld. 422; *Bell v. Pierce*, 51 N. Y. 12; *In re Nichols*, 54 N. Y. 62; *Daniel v. Sullivan*, 46 Ga. 277; *Arnold v. Davis*, 8 R. I. 341; *Tripp v. Brown*, 9 R. I. 240; *Parsons v. City of Bangor*, 61 Me. 457; *Foster v. Hall*, 4 Humph. 346; *Herriman v. Stowers*, 43 Me. 497; *The State*

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v. *Ross*, 4 Zab. 497; *Briggs v. Inhabitants of Rochester*, 16 Gray, 337; *Lee v. City of Boston*, 2 Gray, 484; *Carnoe v. Inhabitants of Freetown*, 9 Gray, 357; *Otis v. City of Boston*, 12 Cush. 44; *Cabot v. City of Boston*, 12 Cush. 52; *Harvard College v. Gore*, 5 Pick. 370; *Hilliard on Taxation*, 107-140, and authorities cited; *Cooley on Taxation*, 269, and authorities cited; *Judkins v. Reed*, 48 Me. 386; *Chenery v. Inhabitants of Waltham*, 8 Cush. 327; *Hardy v. Inhabitants of Yarmouth*, 6 Allen, 277; *Mead v. Inhabitants of Boxborough*, 11 Cush. 362; *Fry's Election Case*, 71 Penn. St. 302; S. C., 10 Am. Rep. 698.

From an examination of the foregoing authorities, we are thoroughly satisfied that appellant did not lose his residence in this State; that immediately upon his return home, he was entitled to exercise all his political, civil and municipal rights; that he was eligible to office and entitled to vote; and that he is to be regarded as a person residing within this State, within the meaning of the third section of the assessment law, *supra*, and was subject to be taxed under the first clause of said section.

The conclusion reached renders it unnecessary for us to consider the second question stated above. As the appellant is subject to taxation as a resident of the State, he cannot also be taxed as a non-resident.

The facts are all agreed to. There is no necessity for a new trial. *Buskirk's Prac.* 334.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to render judgment for the appellee.

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 WHITE v. CARLTON.

**PRINCIPAL AND SURETY.**—*Indemnity to Co-surety.*—Where a surety received from the principal debtor an indemnifying chattel mortgage, a co-surety could have no right of action against said mortgagee for failing to cause

52	371
153	510
52	871
159	41

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gage to be recorded, if it was taken upon an agreement that it should not be placed on record.

ASSIGNMENT OF ERRORS.—*Motion for New Trial.—Open and Close.*—Error in allowing a party to open and close is a cause for a new trial, and on appeal can not properly be assigned as error.

PRINCIPAL AND SURETY.—*Payment by Negotiable Note.—Contribution.*—The satisfaction of a debt by a surety by giving his own note, governed by the law merchant, to the creditor, is such a payment as will authorize such surety to sue a co-surety for contribution.

From the Elkhart Circuit Court.

*J. H. Baker, J. A. S. Mitchell, R. M. Johnson and W. H. Calkins*, for appellant.

*M. F. Shuey, J. M. Vanfleet and W. A. Woods*, for appellee.

DOWNEY, C. J.—Suit by the appellant against the appellee. The complaint is in three paragraphs. It is alleged in the first paragraph, in substance, that the plaintiff and defendant were co-sureties of Davis and Johnson, on a promissory note to one Winchell; that at the time the note was executed to the payee, the defendant, to save himself and the plaintiff harmless, took from Davis and Johnson, or one of them, a chattel mortgage; that the defendant concealed the fact of such mortgage from the plaintiff; that the said Davis and Johnson paid to the defendant one dollar and fifty cents to pay for recording the mortgage, and the defendant agreed to have the same recorded within ten days, and promised Davis and Johnson that he would hold his lien on the mortgaged property so as to save the sureties on the note harmless; that the goods, etc., remained in the possession of the mortgagors, and the same were ample to satisfy the note, interest, and costs.

It is then averred that the defendant failed to record the mortgage within the ten days, in Elkhart county, where the goods were situated, etc.; that Davis and Johnson, before the payment of the note, became bankrupt and insolvent, and have so remained; that Winchell obtained judgment on the note, and Davis and Johnson paid thereon five hundred

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dollars, and the plaintiff was compelled to and did pay the residue thereof, eight hundred and ninety-six dollars and fifty-eight cents.

It is then alleged that, by reason of the negligence of the defendant in not having the mortgage recorded, the security became and was unavailable, and the mortgaged property was seized and sold by other creditors of Davis and Johnson. Prayer for judgment for twelve hundred dollars.

The second paragraph states the facts as in the first, except that it alleges, generally, that the defendant was indemnified by Davis and Johnson, and that he retains the indemnity, and has not paid any part of the debt. The prayer is the same as in the first paragraph.

The third paragraph is like the first, except that it alleges the value of the mortgaged property at five thousand dollars, and omits any allegation of an agreement to have the mortgage recorded. It avers that the defendant holds the mortgage and retains the indemnity, and prays judgment for two thousand dollars.

The defendant demurred separately to each paragraph of the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, and the demurrers were overruled.

The defendant then answered in two paragraphs. In the first it is stated, that "the defendant, for partial answer to each paragraph of complaint, separately, says," etc. Then follows the first paragraph of answer, made up of denials and affirmations. It was probably intended as a bar to any relief on account of the indemnity given to the defendant by the principals in the note and the failure of the defendant to record the mortgage in time. It is not shown, however, with any certainty, to what part of the complaint the answer is pleaded.

It is alleged, among other things, that it was agreed, when the mortgage was executed by Davis and Johnson to the defendant, that the same should not be recorded, in order that it might not affect the credit of the mortgagors, and

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that the defendant accepted and received it under that agreement.

The second paragraph of the answer alleges, that when the payment of five hundred dollars was made on the note by Davis and Johnson, it was agreed between Winchell and White, and Davis and Johnson, that an extension of time for one year for the payment of the balance of the debt and judgment should be made and granted, in consideration of such payment; that, in pursuance of such agreement, an extension was granted, and on the 1st day of July, 1869, said Davis and Johnson having become bankrupt, said White procured of said Winchell a further extension of time for one year, and executed his note to Winchell for the amount then due, payable one year after date, which note said plaintiff has never paid, but said Winchell still holds the same; and that said agreements for extension of time were made without the knowledge and consent of the defendant.

A demurrer to the first paragraph of the answer was filed by the plaintiff and overruled. The plaintiff replied in four paragraphs, the third of which was afterwards withdrawn.

The first paragraph of reply was a general denial of the first and second paragraphs of the answer.

The second paragraph of the reply was to so much of the first paragraph of the answer as refers to the payment of the sum of five hundred dollars on the note by Davis and Johnson. It alleges that the money so paid was borrowed by Davis and Johnson as principals, and defendant as their surety, of one Gordon, and for the payment of which the plaintiff was in no wise bound, and the defendant did not consent to its application as a payment on said note.

The fourth paragraph is to the second paragraph of the answer, and avers that the said note given by him to Winchell for said sum of eight hundred and twenty-eight dollars and nine cents, the residue of said judgment, was in extinguishment and payment of said judgment, etc., which note is secured by mortgage, etc.

A demurrer to the second and fourth paragraphs of the

reply, separately, was filed by the defendant and overruled by the court.

There was a trial by jury and a verdict as follows:

"We, the jury, find that the five hundred dollars mentioned in the complaint as paid upon said judgment, on the 25th day of June, 1868, was paid thereon by the said Davis and Johnson. We further find that the balance due upon said judgment, amounting to eight hundred and twenty-six dollars and fifty-eight cents, was, on the 1st day of July, 1869, paid and satisfied by the plaintiff, White, in the following manner, viz., by giving his negotiable promissory note, secured by mortgage, which note has not been paid, and is still held by said Winchell, said note bearing date July 1st, 1869, and payable to the order of said Winchell, one year after date, at the First National Bank of Laporte, Indiana, with ten per cent. interest from date, and said Winchell received and accepted said note in full for the balance of said judgment and interest, and entered said receipt on the judgment docket in said cause, and that said White has paid fifty dollars costs accrued thereon. We further find that said Carlton did negligently and carelessly omit and fail to record said chattel mortgage. If, upon the foregoing facts, the law be with the plaintiff, then we find for the plaintiff, and assess his damages at six hundred and ten dollars and forty-seven cents. But if the law be with the defendant, then we find for the defendant."

The plaintiff moved for a *venire de novo*, on the grounds:

1. The special verdict does not cover all the issues in the cause, in this, viz., that the jury failed to find the value of said mortgaged goods.

2. The said jury failed to find and assess the damages sustained by the plaintiff in consequence of said defendant's having negligently and carelessly failed and omitted to record said chattel mortgage.

3. That said jury failed to find and assess the proper amount of damages, in this, that the jury should have assessed the damages at the full amount of said eight hundred

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and twenty-six dollars and fifty-eight cents of debt, and fifty dollars costs paid, making eight hundred and seventy-six dollars and fifty-eight cents, and interest thereon from July 1st, 1869, making the true amount one thousand and ninety-four dollars and eighty-two cents, which the jury should have assessed as the damages, instead of six hundred and ten dollars and forty-seven cents. Wherefore, etc.

This motion was overruled by the court. The plaintiff then moved the court to render judgment in his favor, on the special verdict, for twelve hundred and forty-seven dollars, which motion was also overruled. He then moved the court to render judgment in his favor for one thousand and ninety-four dollars and eighty-two cents, which motion was also overruled. He then moved for judgment for six hundred and ten dollars and forty-seven cents, which was also overruled. He then moved for judgment for five hundred and fifty dollars and nine cents, which motion was likewise overruled. The court thereupon, on its own motion, rendered judgment for the plaintiff for twenty-five dollars, being for one-half of the costs paid by the plaintiff, less the interest thereon paid by the plaintiff, and excluding the amount paid by the note of White to Winchell, of July 1st, 1869. Exceptions were taken to each of such rulings. The court taxed all the costs in the case to the plaintiff, and rendered judgment therefor in favor of the defendant.

The plaintiff moved the court to correct the judgment, and enter the same for six hundred and ten dollars and forty-seven cents, as assessed by the jury, on the ground that the execution by White, and acceptance by Winchell, of said negotiable note of July 1st, 1869, as money, and in full payment and satisfaction of said judgment, is sufficient to give said White a right of recovery; but the court overruled the motion, and refused to correct the judgment and enter the same for any other or different sum than as aforesaid, and ruled that White had no right of action on account of any payment made by said note.

The plaintiff again excepted. The plaintiff then notified

the court that he reserved each and every question of law decided as aforesaid by the court during the progress of the trial, under section 347 of the second volume of the statutes, etc.

The court thereupon ordered that the complaint and exhibit filed therewith, the answer and reply thereto, and the bill of exceptions taken by the plaintiff, etc., and the special verdict of the jury, and entries on the order book, be made part of the bill of exceptions, and of the record in the cause.

Errors are assigned by the appellant as follows:

1. Overruling the demurrer to the first paragraph of the appellee's answer.
2. Allowing the appellee to open and close.
3. Overruling the motion for a *venire de novo*.
4. Refusing to enter judgment on the special verdict of the jury for the appellant for one thousand and ninety-four dollars and eighty-two cents.
5. Refusing to enter judgment on the special verdict for the plaintiff for six hundred and ten dollars and forty-seven cents.
6. Refusing to render judgment for the plaintiff for five hundred and fifty dollars and nine cents.
7. In rendering judgment for twenty-five dollars only.
8. Refusing to correct the judgment, on motion of the appellant, and enter judgment for him as prayed.
9. In not sustaining the demurrer to the reply to the first and second paragraphs of the answer.

The appellee has assigned as a cross error the overruling of the demurrers to the several paragraphs of the complaint.

First, we are to consider the sufficiency of the first paragraph of the answer. Assuming that it sufficiently appears that this paragraph was intended to be confined to so much of the complaint as seeks to recover on account of the chattel mortgage and the failure of the defendant to record the same, we think, to that extent, it is a bar to the action. If the defendant took the mortgage upon an agreement that he

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would not place the same on record, the plaintiff, who could claim no interest in the mortgage, except through the defendant, would be bound by that agreement, and could not claim a right of action against the defendant for not doing what he was thus restrained from doing by his contract.

The second alleged error is only a ground on which a new trial might have been granted, if it was an error, and it was not presented by a motion for a new trial. *The White Water Valley R. R. Co. v. McClure*, 29 Ind. 536.

Third, as to the motion for a *venire de novo*. It is decided that when the verdict, either general or special, is imperfect, by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages, the proper step for relief against it is not by motion for a new trial, but by an application for a *venire de novo*. *Bosseker v. Cramer*, 18 Ind. 44. It seems to us that the special verdict was defective.

Next, as to the fourth, fifth, sixth, seventh and eighth alleged errors. The judgment was wrong upon the facts found in the special verdict. The court seems to have proceeded upon the theory that the satisfaction of the note to Winchell by the plaintiff, by giving his own note governed by the law merchant, was not such a payment of the note as would enable him to sue for contribution. In acting upon this theory, the court rendered judgment in favor of the plaintiff for twenty-five dollars only, which was for one-half of the costs paid by the plaintiff. In this we think the court committed an error. The satisfaction of the note by the giving of the negotiable note was such a payment as authorized the plaintiff to sue for contribution. *Keller v. Boatman*, 49 Ind. 104. Had the note not been negotiable according to the law merchant, the rule would have been different. The plaintiff was entitled to recover to the extent of one-half of the amount paid by him, without any reference to the chattel mortgage and the failure to record the same.

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The ninth alleged error has nothing in it.

We have already stated that we think the first paragraph of the answer was sufficient. We think the second paragraph, also, is good. The second paragraph of the reply is clearly bad, but that question is not before us.

We think the cross error cannot be sustained. There is a good cause of action for some amount stated in each of the paragraphs of the complaint. Independent of the matter relating to the chattel mortgage, there is enough stated to entitle the plaintiff to recover some amount.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion for a *venire de novo*, and for further proceedings.

## OWEN v. THE STATE:

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**CRIMINAL LAW.—Receiving Stolen Goods.—Instructions.**—On the trial of an indictment containing a count for larceny and a count for receiving stolen goods, the court, having charged the jury, as to the former count, that one of the essentials thereof was, that the goods “were so stolen by the identical” defendant, naming him, “named in the indictment, alone, or by him acting jointly with others,” instructed as to the latter count that it was material thereunder “that the articles named in that count, or some of them, were by some one feloniously stolen, taken and carried away from” the owner named in the indictment.

**Held**, that the jury could not have been misled by said instruction as to the receiving of stolen goods, by its failure to state that the goods must have been feloniously taken by some one other than the defendant.

**SAME.**—The court also instructed the jury as to said count for receiving stolen goods, that it was essential thereunder “that the identical” defendant, naming him, “named in that count, did feloniously, knowing that such goods were so stolen, receive or conceal them, or a part of them.”

**Held**, that this instruction was not erroneous for not stating that the goods must have been received from the thief or his agent.

From the Whitley Circuit Court.

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*W. Olds and Carpenter & Cook*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

WORDEN, J.—The appellant, together with several others, was indicted for larceny and receiving stolen goods. The indictment contained four counts, two only of which need be noticed. The first charged the defendants with having stolen four barrels of flour, and three kits and four kegs of butter, the property of the Pennsylvania Company. The third charged them with having feloniously received and concealed the same property, belonging to the same company, knowing the same to have been before that time feloniously stolen, etc.

The appellant was tried separately and acquitted of all but the third count, upon which he was convicted. Judgment accordingly, over the appellant's motion for a new trial.

The only question made here is, whether the court below erred in overruling the appellant's motion for a new trial, the reasons for which were, in substance, that the verdict was not sustained by the evidence, and that the court erred in giving certain charges to the jury.

We have examined the evidence with care, and are satisfied that we should not disturb the verdict of the jury.

The jury were clearly authorized by some of the evidence to have found the appellant guilty of the larceny of the goods, as charged in the first count of the indictment. They must have done so, had they believed in full the evidence of one of the witnesses for the State. But there were circumstances tending to impair the credibility of the witness. The jury were not necessarily bound to believe all the witness testified to, or to reject his evidence altogether. They might believe him in part, and disbelieve him in part, if they saw good cause to do so from his manner upon the witness stand and the circumstances of the case, viewed in connection with the other evidence in the cause.

Conceding that the appellant was not shown to have been

guilty of the larceny, we think the evidence was sufficient to establish, beyond a reasonable doubt, his guilt as charged in the third count. The value of the goods received and concealed by the appellant, on the theory that he was guilty, was more than five dollars.

We proceed to the charges complained of. The court, in stating to the jury the material averments of the third count, said that they were, amongst other things:

“1. That the articles named in that count, or some of them, were, by some one, feloniously stolen, taken and carried away from the Pennsylvania Company.

“3. That the identical Jeremiah Owen named in that count did, feloniously, knowing that such goods were so stolen, receive or conceal them, or a part of them, in the county of Whitley, and State of Indiana.”

It is objected that the first proposition is erroneous, in not stating that the goods must have been feloniously taken by some one other than the defendant. It may be conceded that if the defendant stole the goods, he could not be convicted as a receiver.

But the jury could not have been misled. They were not left to suppose that if the goods had been feloniously taken by the appellant himself, he could be convicted upon the count for receiving. In stating to the jury the substance of the first count, that for the larceny, the court had said to them that one of the essentials of that count was “that they,” the goods, “were so stolen by the identical Jeremiah Owen named in the indictment, alone, or by him acting jointly with others.” The jury, we think, must, from the charges given, have clearly understood that, if the appellant himself stole the goods, the first, and not the third, count was the one upon which he should be convicted.

The third proposition is objected to because it does not state that the goods must have been received from the thief or his agent. 2 Whart. Crim. Law, sec. 1893, is cited. The goods could not have been *feloniously* received by the appellant, he knowing them to have been stolen, if the circumstan-

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ces were such as to render the receipt innocent. The felonious receipt of the goods implies all that is necessary to make the receipt criminal. An indictment is good, which charges the felonious reception of stolen goods, knowing them to have been stolen, without any statement that they were received from the felon or his agent, or other circumstances showing the reception to have been criminal. *Kaufman v. The State*, 49 Ind. 248. The statement of the court was legally correct, and if the appellant had desired any further explanatory statement, he might have asked it.

There is no error in the record.

The judgment below is affirmed, with costs.

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**ASSIGNMENT OF ERROR.**—*Sufficiency of Complaint.*—If any paragraph of a complaint containing several paragraphs be sufficient, a judgment for which such paragraph forms a proper foundation will not be reversed by the Supreme Court on an assignment of error that the several paragraphs of the complaint, specifying them by their numbers, do not either of them state facts sufficient to constitute a cause of action.

**PLEADING.**—*Statute of Limitations.*—*Answer.*—An answer which, instead of alleging that the cause of action did not accrue within the prescribed period before the commencement of the action, alleges that the defendant did not, at any time within the prescribed period before the commencement of the action, undertake, promise or agree, etc., is bad as an answer of the statute of limitations.

**BILL OF EXCEPTIONS.**—*Setting Aside Order for New Trial.*—The Supreme Court will not review the action of a court in setting aside an order granting a new trial, in the absence of a bill of exceptions showing the grounds of such ruling.

**SAME.**—*Overruling Motion for New Trial.*—The action of a court in overruling a motion for a new trial, a bill of exceptions reserving the questions presented in such motion being on file at the time of such ruling, may be presented to the Supreme Court without a bill of exceptions showing the grounds of such ruling.

**RESULTING TRUST.**—Where a person caused certain land to be conveyed to another, the consideration moving from the former, upon an agreement

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that the latter should sell and convey the land and with the proceeds pay certain debts of the former, and account to him for the residue; *Held*, that the trust was valid, as a resulting trust, without any declaration or acknowledgment thereof in writing.

*Held*, also, that, the trustee having sold and conveyed the land to a third person, and having received the purchase-money, and having paid a portion thereof in discharge of said debts and a part of the residue to the *cestui que trust*, the remaining part, which he refused to pay, might be recovered in an action against him by the *cestui que trust*.

From the Montgomery Circuit Court.

*J. McCabe*, for appellant.

*E. N. Smith and Kennedy & Brush*, for appellee.

DOWNEY, J.—Suit by the appellee against the appellant. The complaint is in three paragraphs. The first paragraph is for money had and received. The second alleges that, prior to the year 1865, the plaintiff purchased certain real estate, described in the complaint, near Thorntown, in Boone county, Indiana, and paid for the same with his own money; that subsequently he caused the legal title to said land to be conveyed to the defendant, Jesse B. McCollister, without any consideration, to hold in trust for the use and benefit of the plaintiff, and to convey the same to whomsoever might purchase the same from the plaintiff; that subsequently said land was sold to one Zachariah Morris, Sr., for the sum of three thousand dollars, and a deed made to the same by Jesse B. McCollister and his wife, Ruth McCollister, the former of whom received the consideration thereof, the said three thousand dollars, for the use and benefit of this plaintiff as his trustee; that plaintiff has requested and demanded said money so received for said land of said Jesse B. McCollister, but that said McCollister refuses to pay the same to him, with the exception of one thousand dollars; wherefore he sues and demands judgment for three thousand dollars.

And for a third and further cause of action against the said defendant, said plaintiff says that, in the year 1865, he entered into a written contract with the defendant, as follows, to wit:

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The plaintiff was to cause the following lands to be conveyed to said defendant, to wit: A part of the west half of the southwest quarter of section thirty-five, in township twenty north, of range two west, beginning at the southwest corner of said tract above described, running thence north fifty-two rods, thence west thirty-one rods, thence south fifty-two rods, thence east to the place of beginning, containing ten acres, which said land said defendant, by the terms of said contract, was to hold in trust for the use and benefit of this plaintiff, and sell for him whenever he could find a purchaser therefor, at plaintiff's price, to wit, three thousand dollars; that out of the proceeds of such sale defendant was to pay all the costs of such sale and transfer, including a reasonable compensation for his services in selling said land for the plaintiff, and that this was the only written contract ever made between the plaintiff and defendant concerning said land; that subsequently said defendant, pursuant to said written contract, sold and conveyed said tract of land to one Zachariah Morris, Sr., for the sum of three thousand dollars, which the said defendant has converted to his own use, and refuses to pay the same to plaintiff. And plaintiff further says that said defendant, by false and fraudulent representations, obtained from the plaintiff the possession of said written contract, and destroyed or concealed, and yet conceals, from the plaintiff; wherefore plaintiff cannot file a copy of the same with this complaint; and plaintiff demands judgment against defendant for three thousand dollars.

The defendant answered in four paragraphs. The first was to the first paragraph of the complaint, and avers that the defendant did not, at any time within six years next before the commencement of this action, undertake, promise, or agree to pay to the plaintiff the said sum of money, for which he prays judgment in his said complaint, or any part thereof.

The second paragraph is confined to the second paragraph of the complaint, and admits that the tract of land described

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was purchased and paid for by the plaintiff, as he has alleged, but alleges that, subsequent to its conveyance to defendant, he sold the same to Zachariah Morris for the sum of three thousand dollars, and received the same; but he denies expressly that said land was conveyed to him without consideration, or in trust for said plaintiff, but avers the fact to be, that at the May term, 1865, of the Boone Common Pleas Court, defendant recovered judgment against plaintiff for a large sum of money, to wit, for about four thousand dollars, upon which said judgment he caused an execution to be issued; that at the time of the recovery of said judgment, the legal title to the land, as defendant was informed and believes, was in Elizabeth Willey, wife of plaintiff, together with other valuable real estate, to wit, a lot and brick business house thereon, situated in the town of Thorntown, Boone county, Indiana, all of which he was informed and believes said plaintiff caused to be conveyed to his said wife for the purpose of defrauding his creditors; that although at the date of said judgment the legal title of all of said property was in said Elizabeth, the indebtedness of said plaintiff upon which judgment was recovered had accrued long prior to the conveyance of said property to his said wife, and said plaintiff was the equitable owner of all the property above mentioned, and the same was liable to be made subject to the payment of said defendant's said judgment, and defendant was about enforcing the same; that a proposition was then made to this defendant on behalf of said wife of plaintiff, Elizabeth, as he understood, that if this defendant would pay certain liabilities then owing by them, separately and together to Hamilton & Galvin and David E. Caldwell, and enter satisfaction of said judgment, she would convey said tract of land, or cause the same to be done, to defendant; that defendant accepted said proposition, and made the payment as agreed upon to the said Hamilton & Galvin and said Caldwell, and receipted said judgment in full, thereby releasing the remainder of said real

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estate in the name of said Elizabeth Willey from all liability upon said judgment; that a deed was executed, in pursuance of said arrangement, by the said Elizabeth and her then husband, John R. Willey, to one David E. Caldwell, for the said tract of land, and by him conveyed to defendant; and defendant denies each and every allegation in said second paragraph of complaint not specifically admitted in this answer.

The third paragraph of the answer was to the third paragraph of the complaint, and was a limited denial; and the fourth paragraph, to the whole complaint, was a general denial.

The reply was in two paragraphs: 1. A general denial. 2. As to the second paragraph of answer, that on the 25th day of January, 1872, the plaintiff instituted a suit against the defendant, on the identical cause of action set up in his complaint in this case, which was within six years of the time said cause of action accrued, and within six years of the time the defendant received the money mentioned in the complaint for the use and benefit of plaintiff; and plaintiff says that said suit, so instituted by him, was transferred on change of venue to Fountain county, where the same was dismissed without any negligence or want of proper diligence on the part of the plaintiff, and that this suit was commenced within four years of the time said suit was so dismissed.

On the 30th of September, 1873, there was a trial by jury, and a verdict for the plaintiff, on which there was final judgment. On the 4th of October, 1873, there was a motion made by the defendant for a new trial, and the defendant filed a bill of exceptions, setting out the evidence. At the next term, on the 21st day of November, 1873, the motion for a new trial was sustained. On the 23d day of November, 1873, the plaintiff moved the court in writing to set aside the order granting a new trial, for the reason, as alleged, that the court, in granting the same, "wholly mistook the evidence and the law." This motion was afterwards sus-

tained, but just when does not appear. The defendant excepted. The court, at the same time, overruled the defendant's motion for a new trial. Defendant excepted, but then filed no bill of exceptions.

Errors are assigned as follows: 1. That the first, second and third paragraphs of the complaint do not either of them state facts sufficient to constitute a cause of action. 2. Overruling the demurrer to the second paragraph of the reply. 3. Setting aside the order granting a new trial. 4. Overruling the motion of appellant for a new trial.

1. We need not examine as to the sufficiency of each paragraph of the complaint, for the reason that if any one of them, forming a proper foundation for the judgment, is sufficient, the judgment cannot, on this assignment, be reversed. The first paragraph is for money had and received, in the sum of three thousand dollars. This paragraph more than covers the amount of the judgment, which was for two thousand and eighty-five dollars, and is unobjectionable, so far as we can see. *Waugh v. Waugh*, 47 Ind. 580.

2. We do not examine particularly the second paragraph of the reply, for the reason that the first paragraph of the answer to which it is pleaded is not good. *Meniffee v. Clark*, 35 Ind. 304. By the statute of limitations, the action must be commenced within the prescribed period after the cause of action has accrued. 2 G. & H. 156, sec. 210. The first paragraph of the answer, instead of alleging that the cause of action did not accrue within the prescribed period, alleges that the defendant did not, at any time within six years next before the commencement of the action, undertake, promise or agree, etc. As the cause of action upon a contract does not necessarily, nor, perhaps, generally, accrue when the promise is made, but only when it is violated, it must follow that the first paragraph of the answer is bad. At common law, there was a clear distinction between the plea of *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*. Where the cause of action and the promise were contemporary, the former mode of pleading might be adopted; but

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where the cause of action arose subsequently to the promise, as in the case of executory contracts, the latter form was used; for, although the promise was not made within the limit, the cause of action may have accrued within the time, which was sufficient to save the right of action from the bar of the statute. The first paragraph of the answer may be liable to other objections.

3. There is no bill of exceptions showing the ground on which the court acted in setting aside the order granting the new trial, in the absence of which it is not for us to say that the action of the court was erroneous.

4. We have stated that there was a bill of exceptions filed setting out the evidence, but no bill of exceptions showing the grounds on which the court acted in overruling the motion for a new trial. Can we, in this condition of the record, say that the court committed an error? Can the question as to the correctness of the ruling of the court in refusing a new trial, the evidence being in the record by a bill of exceptions previously filed, be reserved without a bill of exceptions filed at the time of the ruling on the motion?

After a full consultation, we have come to the conclusion that it can. The reasons, or grounds, for a new trial are stated in the written motion. The motion is part of the record without a bill of exceptions. The evidence, and the points made and reserved during the trial, are set forth and stated in the bill of exceptions. Nothing else is necessary to present the questions.

No question is made under this assignment of error, except as to the sufficiency of the evidence to justify the verdict of the jury. Some matters are brought to view in the case that we can but regard as exceedingly disreputable on the part of both plaintiff and defendant and others participating therein. We have been led to consider whether or not these matters are so intimately connected with the cause of action as to render the alleged contract void. Not being satisfied that such is the case, we have carefully examined the evi-

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*Tarvin et al. v. Risher et al.*

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dence, and have arrived at the conclusion that the judgment cannot be reversed on the evidence.

The judgment is affirmed, with two per cent. damages and costs.

ON PETITION FOR A REHEARING.

DOWNEY, C. J.—In a petition for a rehearing, the appellant again urges the insufficiency of the evidence to justify the verdict of the jury. It is insisted that the evidence shows only an express trust, and that as there was no writing to prove its existence, it cannot be enforced.

The consideration for the conveyance of the land to the appellant moved from the appellee, and the appellant agreed to sell the land, pay certain debts of the appellee, and account to him for the residue of the amount received. The appellant sold the land and received the purchase-money. He paid a small amount in discharge of the debts of the appellee, and also a part of the residue, but refused to pay the remaining part. For this residue the judgment was rendered. We think, according to *McDonald v. McDonald*, 24 Ind. 63, *Gwaltney v. Wheeler*, 26 Ind. 415, and *Milliken v. Ham*, 36 Ind. 166, the trust was valid, as a resulting trust, without any declaration or acknowledgment thereof in writing.

The petition is overruled.

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TARVIN ET AL. v. RISHER ET AL.

From the Putnam Circuit Court.

*S. Claypool, J. A. & C. C. Matson* and *Knight & Stone*, for appellants.

*H. W. Chase, J. A. Wilstach* and *F. S. Chase*, for appellees.

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Durgan *et al.* v. The State, *ex rel.* Wayne Township.

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DOWNEY, C. J.—In this case demurrers to the paragraphs of the complaint were sustained in the circuit court. The plaintiff appealed, and has assigned this ruling as error.

The case turns mainly upon the construction of a mining lease, which is the same in form and language as the lease in question in the case of *Knight v. The Indiana Coal and Iron Co.*, 47 Ind. 105. In that case we arrived at the conclusion that the lease created an estate at will in the lessee, and that the estate was also at the will of the lessor. The lease in this case must receive the same construction.

Without deciding any other question in the case, if there is any other, we will let the case go back to the circuit court, where the rights of the parties can be adjusted in accordance with the lease, as it has been thus construed.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrers to the complaint.

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DURGAN ET AL. v. THE STATE, EX REL. WAYNE TOWNSHIP.

From the Tippecanoe Circuit Court.

*J. R. Coffroth* and *J. A. Stein*, for appellants.

*W. C. Wilson* and *J. H. Adams*, for appellee.

DOWNEY, C. J.—In this case a confession of the errors assigned was filed by the trustee of the township. Counsel for the appellant objected to such disposition of the cause, and we declined to dispose of it in that way, and have examined the errors assigned. We find that on some of them the judgment will have to be reversed. As the appellee, by the township trustee, still confesses the alleged errors, it seems to us as well to let the case go off upon the confession.

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McReynolds v. The State, *ex rel.* Freeman.

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The errors assigned are the overruling of the demurrer to the amended complaint, and the refusal of the court to grant a new trial.

The judgment is reversed, with costs, upon the confession of the errors assigned, and the cause remanded for further proceedings.

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McREYNOLDS v. THE STATE, EX REL. FREEMAN.

RECORD.—*Bastardy*.—*Plea*.—Where, in a bastardy proceeding, there has been a trial by jury, and the defendant has had all the benefit of a denial of the charge, he cannot, on appeal to the Supreme Court, object to the judgment against him because the transcript of the record shows no formal plea filed by him, and none entered of record in his behalf.

SAME.—*Nunc Pro Tunc Entry*.—*Notice*.—Where, upon the hearing of a motion of a party to correct the record of an action by a *nunc pro tunc* entry, it is proved that the adverse party has had notice of the motion, and this is shown by the transcript of the record on appeal to the Supreme Court, it is not necessary that the notice itself and the service thereon should be incorporated in the record.

From the Posey Circuit Court.

*L. R. Williams* and *H. C. Pitcher*, for appellant.

*E. M. Spencer* and *W. Loudon*, for appellee.

BIDDLE, J. — Prosecution by Lake Erie Belle Freeman against Samuel D. McReynolds, for bastardy. Trial by jury, and a verdict of guilty. Motion for a new trial overruled, judgment, exception, order of filiation, appeal.

The transcript, as originally filed in this court, did not contain the complaint, as filed before the justice of the peace, but it shows that such complaint had been filed, and also contains the examination, in writing, of the complainant. It also shows a verdict, defective in form. A *certiorari* from this court has brought up a complete transcript, which contains the original complaint and the verdict in full form. Both are sufficient. But it is still insisted by the appellant that, as the transcript shows no formal plea filed by him

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below, and none entered of record on his behalf, the judgment is erroneous. We think otherwise. The statute does not, in terms, require a written or formal plea, or answer. It enacts, that, "if the defendant, in the circuit court, deny the charge, the issue shall be tried by the court or a jury." Sec. 13, 2 G. & H. 628. There having been a jury trial, we must presume that the appellant denied the charge. At least, he has had all the benefit of such a denial. *Wolf v. The State*, 11 Ind. 231; *Taylor v. Short*, 40 Ind. 506.

It is also urged by the appellant, that "the supplemental transcript fails to show that the appellant had any notice of the motion to amend the record, and it does not appear from the said transcript that there were any memoranda of the judge or clerk, or anything in the papers, by which to amend, or that there was any proof that the verdict was erroneously entered by the clerk; and therefore, that the *nunc pro tunc* entry is a nullity, because the notice and return of service are not incorporated into the record."

But the record does show that the appellant had notice of the motion, and that such notice was proved at the hearing. When such proof is made, in cases of this kind, it is not necessary that the notice itself and the service upon it should be incorporated into the record.

The exception in section 559, 2 G. & H. 273, applies only to the original summons in the case, leaving the practice with regard to general notices, collateral to a suit, as it stood before the enactment of the code, when it was not necessary to make a notice of this kind and service upon it a part of the record, if the record showed that proof of notice and service had been made. It is also shown that the jury returned the verdict in full; as it now appears in the record. These were memoranda by which the record could be corrected. Besides, such an argument would have been more useful in the court below, in answer to the motion, than in this court against the transcript, which we must hold, as it is officially certified, to be "full, true and complete."

The judgment is affirmed, with costs.

Wyble *et al.* v. McPheters *et al.*

## WYBLE ET AL. v. MCPHETERS ET AL.

52	398
136	339
52	398
140	643

**TRUST.—*Gift Inter Vivos.***—A person delivered certain United States bonds and money to another, with directions for the latter to give the same to certain children of the former upon his death, and the person to whom said bonds and money were so delivered received them and agreed to execute the trust.

**Held,** that this was a sufficient delivery to constitute a gift *inter vivos*, and that, upon the death of the donor, an action would lie in favor of said children, against said trustee, upon his refusal to execute the trust, and against the administrator of the estate of the donor, to whom said trustee had delivered said bonds and money, it not appearing that the donation was void as against creditors..

**PLEADING.—*Amended Complaint.*—*Clerk's Certificate.***—A complaint may be an amended one without appearing on its face to be such, and the certificate of the clerk that the complaint copied by him into the transcript of the record is an amended complaint is conclusive.

From the Washington Circuit Court.

*H. Heffren*, for appellants.

*T. L. & A. B. Collins*, for appellees.

**WORDEN, J.**—Complaint by the appellants against the appellees, as follows:

“Laura C. Wyble and Sallie M. McPheters complain of Benjamin Standish, administrator of Andrew A. McPheters, deceased, and William M. McPheters, and say that on the 1st day of September, 1873, Andrew A. McPheters departed this life, in Washington county, Indiana, intestate, leaving the plaintiffs, Laura C. Wyble and Sallie M. McPheters, two of his heirs; and that, on or about the 1st day of January, 1874, the defendant Benjamin Standish was duly appointed administrator of the estate of said decedent, by the Washington Circuit Court, and that he immediately qualified as such, and entered upon the discharge of the duties of his said trust, and ever since has been, and now is, acting in that capacity.

“And plaintiffs further say, that on or about the 1st day of January, 1872, the said decedent, who was then and there wholly solvent, and whose estate is now wholly solvent, was

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the owner and in possession of certain personal property, to wit, three bonds of the United States of America for one thousand dollars each, one bond of the United States for five hundred dollars, and certain moneys amounting in all to five hundred and forty-five dollars, making a total of four thousand and forty-five dollars. That said decedent placed said money in separate wrappers, as follows: one endorsed 'For Sallie,' containing forty-five dollars, meaning thereby this plaintiff Sallie M. McPheters; in another wrapper he placed two hundred dollars, and endorsed it 'For Sallie M.,' meaning thereby this plaintiff Sallie M. McPheters; in another wrapper he placed three hundred dollars, and endorsed it 'A. A. McPheters, for Allie and Laura,' thereby meaning this plaintiff Laura C. Wyble and Allie Nugent, who had intermarried with F. R. Nugent. That he placed all of said packages aforesaid, together with the said United States bonds aforesaid, in a large envelope, and safely and securely sealed the same, and endorsed thereon, in substance, 'A. A. McPheters, for Laura, Sallie and Allie,' meaning the plaintiffs, Laura C. Wyble and Sallie M. McPheters, and Allie Nugent, who since said time of said endorsement thereon deceased before the said Andrew A. McPheters. That said Andrew A. McPheters in his lifetime and long before the death of said Allie, gave the said package to the defendant William M. McPheters, and told him the contents of the same, and that the same was for his children, Laura C. Wyble, Sallie M. McPheters and Allie Nugent, and instructed and directed said William M. McPheters, in case of his, Andrew A. McPheters', death, to open said package and give the contents as therein directed to these plaintiffs and Allie Nugent, which the defendant William M. McPheters then and there received in trust for these plaintiffs and Allie Nugent, and agreed to deliver to these plaintiffs and Allie Nugent after the death of said Andrew A. McPheters. That, on or about the 1st day of July, 1873, the said Allie Nugent deceased, and prior to the decease of Andrew A. McPheters. That, after the death of said Allie Nugent, the said Andrew A.

McPheters went and saw the defendant William M. McPheters, and conversed with him in regard to said package, only a short time before his, Andrew A.'s, death, and then told him, William M., that said package in his possession contained money and bonds which he, Andrew A., gave into his care, and told him it was money and bonds to be given to his daughters, Laura C. Wyble and Sallie M. McPheters, at his death, and that it was an absolute gift for his said daughters, and was for these plaintiffs, for their sole use and benefit. That said William M. McPheters, still acting as trustee, repeatedly agreed so to do. That the decedent, in his lifetime, wholly set apart the said sum of four thousand and forty-five dollars, for the sole use and benefit of these plaintiffs, and it was a gift to them, and he had no further control over the same, and appointed said William M. as trustee, to carry into effect the trust reposed in him at said Andrew A.'s decease. That said William M. McPheters had said package, containing said bonds and money, in his possession at the time of the said Andrew A.'s death, and the said Andrew never gave any other directions about said package than those aforesaid. That since the decease of said Andrew A., these plaintiffs have demanded of the defendant William M. McPheters said package, which he has wholly refused to deliver to them, and still refuses to do, thereby disregarding the plain directions and instructions of the decedent, and disregarding his own duty in the premises, and violating the trust reposed in him by said decedent, Andrew A. McPheters. Plaintiffs aver that, instead of regarding his trust and doing his duty in the premises, as he agreed to do with the said Andrew A., he has conspired with his co-defendant, Benjamin Standish, administrator as aforesaid, to defraud these plaintiffs out of said money and bonds, and, although often requested to deliver the same to them, he refuses so to do, but, without any right and against the objections and protestations of these plaintiffs, has delivered the same to Benjamin Standish administrator as aforesaid, and that said administrator is now about to mingle the said prop-

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*Wyble et al. v. McPheters et al.*

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erty aforesaid with the other assets of the said estate of the said decedent, and to use and dispose of the same as he does of other property coming to his hands of said estate, to the great damage of the plaintiffs. Wherefore, in consideration of the matters and premises herein set forth, the plaintiffs ask for an order of this court directing and commanding the said administrator to deliver said property to the plaintiffs, and in case the same has been mingled with the assets of said estate so the same cannot be identified, they demand judgment against said defendant McPheters for ten thousand dollars, the value of said property, and for any other and proper relief to which they may be entitled in the premises.

“2. Plaintiffs, further complaining of the defendants, say that on or about the 1st day of July, 1873, at the county of Washington, and State of Indiana, Andrew A. McPheters then and there placed in the hands of William M. McPheters three bonds of the United States of America of the denomination of one thousand dollars each, and one other bond of the United States of America for five hundred dollars, and money to the amount of five hundred and forty-five dollars, for the use and benefit of plaintiffs; that said William M. McPheters received the same, and agreed with the said Andrew to give the said bonds and money to these plaintiffs, upon the death of said Andrew A. McPheters; that said Andrew A. deceased about September 1st, 1873, at Washington county, Indiana; that these plaintiffs have frequently and repeatedly, since the death of said Andrew A., demanded of said William M. McPheters, defendant herein, the said bonds and money, which he wholly refuses to deliver. Plaintiffs further aver that on or about January 1st, 1874, one Benjamin Standish was duly appointed administrator of the estate of said Andrew A. McPheters, and was duly qualified and immediately entered upon the discharge of his trust, and still continues so to do; and that said defendant William M. McPheters, fraudulently conspiring with said Benjamin as administrator to defraud these plaintiffs out of said money and bonds, delivered the

same to the said Standish as administrator as aforesaid, without right; that said one-thousand-dollar bonds were of the value of one thousand two hundred dollars each, the five-hundred-dollar bond of the value of six hundred dollars; that said William M. McPheters received the same, together with the five hundred and forty-five dollars aforesaid, for the use and benefit of these plaintiffs, and, although often requested to pay over to plaintiffs said bonds and money, wholly fails and refuses so to do; wherefore plaintiffs demand judgment for ten thousand dollars, and any other and proper relief to which they may be entitled."

The defendants demurred to each paragraph of the complaint, for want of sufficient facts, and the demurrer was sustained, the plaintiffs excepting. Final judgment for the defendants.

The error assigned brings in review the ruling on the demurrer.

It is claimed by the appellees that each paragraph of the complaint was bad, because there was no complete delivery of the money and bonds, and, therefore, that the gift cannot be sustained as a gift *inter vivos* or *causa mortis*. We, however, are of a different opinion. It appears in the first paragraph that the money and bonds were, in the lifetime of Andrew A. McPheters, by him delivered to the defendant William M. McPheters, with directions to deliver the same to the plaintiffs and said Allie, deceased, upon the death of him, the said Andrew A., and that said William M. received the same and agreed to execute the trust thus reposed in him. There was a sufficient delivery to constitute a valid gift *inter vivos*. The delivery to William M. McPheters was absolute, unconditional. The subject of the gift was to be unconditionally delivered by him to the plaintiffs (and said "Allie") upon the death of Andrew A., an event which must at some time have taken place. The latter delivery was to depend upon no condition; the time thereof only was uncertain. The second paragraph was equally good. The transaction created the relation of trustee and beneficiaries

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between William M. McPheters and the plaintiffs. See *Miller v. Billingsly*, 41 Ind. 489. A delivery to a trustee for the use of the party to be benefited is as effectual as a delivery to the party himself, as will be seen by the authorities hereinafter cited.

In the case of *Miller v. Billingsly*, above cited, Baily S. Hays gave to Miller a certain draft, out of the proceeds of which Miller was to pay Billingsly five hundred dollars. This was a gift from Hays to Billingsly. It was held that Miller became a trustee for Billingsly, and that the latter could recover the money from the former. This assumes that the delivery to the trustee was a sufficient delivery to make the gift valid.

In *Stone v. Hackett*, 12 Gray, 227, it was held, that "a delivery, without consideration, of shares in railroad corporations, with blank assignments endorsed thereon, upon trust to pay the income to the settler for life, and at his death to transfer the shares to certain charitable objects (the settler reserving the right to modify the uses, or revoke the trust), is valid, and would be upheld in equity against the settler's widow, claiming the share which the law allows her in property of which he died possessed."

We quote a paragraph from the opinion in that case, as containing what seems to be a correct summary of the law on the subject. The court said:

"The key to the solution of the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such agreement or contract be executed

by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor, to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery."

The court, after citing some authorities, and particularly the late case of *Kekewich v. Manning*, 1 De G., M. & G. 176 (50 Eng. Ch.), in which most of the English authorities are considered, proceeded as follows:

"The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity as trustee was full and complete and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. As between the parties, the delivery of the certificates of stock, with the assignments of some of them, and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares."

So, in the case here, the delivery of the money and bonds to William M. McPheters, for the purposes of the trust, was all that was necessary to vest the title in him as such trustee.

In the case of *Gardner v. Merritt*, 32 Md. 78, Susanna A. Merritt had, in her lifetime, deposited money in a bank to the credit of certain children. After her death, a question arose whether the money belonged to the estate of Susanna, or the children, who were her grandchildren. The court said:

"The question is, whether these moneys became, when deposited by the grandmother, perfected gifts to the grandchildren, to whose account she had deposited them, or whether they remained, after the deposits, the property of the grandmother—whether the gifts were perfected, or whether the facts manifest an intention to give in future—whether the

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acts of making the deposits, under all the proof in the cause, divested the grandmother of her title to the moneys, and vested the same in the infants. \* \* \* A gift is inoperative without delivery. To be valid, it 'can have no reference to the future, but must go into immediate and absolute effect. To the perfection of a parol gift of a chattel, delivery is essential, and without actual delivery no title passes.' *Nickerson v. Nickerson*, 28 Md. 332. The delivery may be to the donee, or trustee, or guardian acting for the donee, or to any bailee of the donee. All these conditions were met in this case. The money was delivered by the donor to the bank, as bailee of the infants, by the direction of the donor, that it should be entered to their credit in accounts standing open in their names."

Other cases similar to the above are *Millspaugh v. Putnam*, 16 Abb. Pr. 380; *Howard v. Savings Bank*, 40 Vt. 597; *Minor v. Rogers*, 40 Conn. 512.

In the latter case, it was held that a party having thus made a gift, by depositing money in bank for another, could not annul the transaction by withdrawing the money before it had been received by the donee.

In the case before us, we need not determine whether the donor, Andrew A. McPheters, could, in his lifetime, have annulled the transaction, as he does not appear to have attempted to do so. On this point, however, 1 Perry on Trusts, 2d ed., sec. 104, and notes, may be cited.

In the case above cited from Gray, it was held that the express reservation, by the donor, of the right to annul or revoke the trust, it not having been exercised, did not affect the trust. "A power," said the court, "of revocation is perfectly consistent with the creation of a valid trust. It does not, in any degree, affect the legal title to the property."

It may be observed that no question arises as to the share of Allie Nugent in the donation. The plaintiffs are entitled, on the case made by the complaint, to recover their shares, at all events, if not the whole, under the allegations of the

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first paragraph. If the donation was void as against creditors, this does not appear on the face of the complaint.

For these reasons, we are of opinion that the court erred in sustaining the demurrers.

A point is made by the appellees, as to what complaint is in the record, and also what demurrer.

The record shows that a demurrer was filed and sustained to the complaint, and that the plaintiffs then filed an amended complaint, to which a demurrer was also filed and sustained. The complaint sent up does not, on its face, purport to be an amended complaint, but the clerk certifies that it is the amended complaint. We think a complaint may be an amended one without appearing on its face to be such, and that the certificate of the clerk is conclusive that the complaint sent up is the amended one. The demurrer sent up was filed on November 4th, 1874, and was addressed to each paragraph of the complaint, but not in terms to the amended complaint. The amended complaint, however, was filed November 3d, 1874, and, as the original complaint had been superseded by the amended one, the demurrer must have been addressed to the amended complaint, as that was the only one to be met by demurrer or answer. There is, evidently, nothing in this point of the appellees.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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EISMAN v. POINDEXTER, EXECUTOR.

**WILL.—Heirs.—Widow.**—A testator by his will disposed of all of his property, leaving nothing to go by descent, making certain devises and bequests to his wife and four children, naming them, and directing that

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the residue of his estate should be equally divided among his "above named heirs."

*Held*, that the widow was one of the residuary legatees.

From the Clarke Circuit Court.

*J. H. Stotsenburg*, for appellant.

*G. B. Cardwell*, for appellee.

WORDEN, J.—Absalom L. Sellers died, leaving a widow, Margaret, now Margaret Eisman, and four children, viz., Emma, now Emma Lewman, Arthur, John and Pinkney Sellers, having made his last will, so much of which as is necessary to an understanding of the point here involved is as follows:

"As to such estate as I have been entrusted with, I dispose of the same as follows:

"After the payment of all my just debts and funeral expenses,

"1. I give and bequeath unto my beloved wife, Margaret Sellers, all the real estate that I own in Clarke county, in the State of Indiana, not otherwise disposed of in this will. I value said real estate at two thousand dollars. I also give and bequeath to my said wife the sum of five thousand and seven hundred dollars. I also direct that my said wife retain possession of the property on which I now reside, in the town of Sellersburg, and keep up the store, until my son Arthur Sellers arrives at the age of twenty-one years.

"2. I give and bequeath unto my daughter Emma Sellers all the real estate that I own in the city of Jeffersonville, Clarke county, Indiana, which I value at fifteen hundred dollars. I also give and bequeath unto my said daughter Emma the sum of four thousand two hundred dollars in money or United States bonds, to be paid to her when she arrives at the age of twenty-one years or is married.

"3. I give and bequeath to my son Arthur Sellers all the real estate that I own in the town of Sellersburg, Clarke county, Indiana, which I value at two thousand three hundred and fifty dollars. I also give and bequeath unto my

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said son Arthur the store in Sellersburg, which I value at three thousand dollars, and I direct that my wife have possession thereof, and continue the business as I am now conducting it, the profits thereof to be used by my said wife in supporting my children until my son Arthur becomes of the age of twenty-one, when he is to have full possession; and if the stock should not be worth three thousand dollars, then the deficiency is to be made up to my said son in money or United States bonds.

"4. I give and bequeath to my son John Sellers the sum of five thousand five hundred dollars in money or United States bonds, to be paid him when he becomes twenty-one years of age.

"5. I give and bequeath to my son Pinkney Sellers the sum of five thousand five hundred dollars in money or United States bonds, to be paid him when he arrives at the age of twenty-one years.

"6. If the above bequests should not exhaust my estate, then the residue to be divided equally among my above named heirs."

The debts and general legacies are all paid, and there remains for distribution to the residuary legatees, under the sixth clause of the will, the sum of five thousand eight hundred and thirteen dollars and sixteen cents. The widow claims to be entitled to her share as one of the "above named heirs," as mentioned in the sixth clause. The court below, however, held that she was not, and rendered judgment accordingly.

The testator devised all his property, and left nothing to go to his heirs by descent.

Those who took under the will took as devisees or legatees, and not as heirs. The testator named the five legatees, viz., his wife and the four children, and made to them certain devises and bequests, and finally, in the sixth clause of the will, provided that the residue of his estate should be equally divided among his "above named heirs." We are of opinion that the widow is included as one of the residuary

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legatees. It seems to us to have been the intention of the testator to bestow the residue of his property upon those previously named, to whom he had made devises and bequests, viz., his wife and the children. He called them heirs, but they took nothing as heirs. The words, "my above named heirs," were intended by the testator, as we think, to embrace the above named legatees. The children, to be sure, were heirs of the parent, though they took nothing as such. So, also, was the wife an heir of her husband, though she took nothing as such heir. There are several instances in which the widow takes property as heir to her husband. See *May v. Fletcher*, 40 Ind. 575. It was, therefore, a no greater misapplication of terms to call the wife an heir, than it was to call the children heirs, in a case where neither took anything as such. The widow is entitled, in our opinion, to one-fifth of the residue, by the terms of the will.

The judgment is reversed, with costs, to be levied *de bonis testatoris*, and the cause remanded for further proceedings, in accordance with this opinion.

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BROWN ET AL. v. McELROY.

**DEMAND.**—*Certificate of Deposit.*—A certificate of deposit was issued by a bank for a certain sum, subject to the order of the depositor, at a certain date, payable on return of the certificate.

*Held*, in an action on said certificate against the bank, brought by an assignee, that there could be no recovery without proof of an actual demand and refusal of payment.

From the Warren Circuit Court.

*Wallace & Rice*, for appellants.

*J. McCabe*, for appellee.

**BUSKIRK, J.**—Joseph Brown and George H. Aylsworth,

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who were partners and doing business under the firm name and style of Fountain County Bank, in Attica, Indiana, on the 27th day of September, 1869, executed the following certificate of deposit:

"1,000.00.

FOUNTAIN COUNTY BANK,

"ATTICA, IND., Sept. 27th, 1869.

"N. S. Brown has deposited in this bank one thousand dollars in currency, subject to the order of himself, two months after date, with interest from August 27th, 1869, and payable in like funds on the return of this certificate, and in legal tender currency, payable thirty days from January. No. 2163.

G. H. AYLSWORTH, Cashier."

Upon the back thereof there was the following endorsement:

"ATTICA, January 25th, 1872.

"For value received, I assign the within to Emily C. McElroy.

N. S. BROWN."

The action was by the appellee against the appellants upon the above instrument. The complaint alleged the execution and assignment of the instrument and a demand and refusal of payment. There was issue, trial by the court, finding and judgment for the appellee, over a motion for a new trial. The appellants have assigned for error the sustaining of a demurrer to the third paragraph of the answer and the overruling of the motion for a new trial.

Counsel for appellants, in their brief, expressly waive all questions except the sufficiency of the evidence to sustain the finding, and the objection urged to the evidence is, that there was no proof of a demand of payment on the part of the appellee and a refusal of payment on the part of the appellants, or of an offer to return the certificate of deposit. The question presented for decision is, whether in an action upon the above instrument it was necessary to prove an actual demand of payment and a refusal to pay.

Counsel for appellee insists that she was entitled to recover without any proof of a demand of payment and a

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refusal of payment, and in support of such position cites the following cases:

*Johnson v. Seymour*, 19 Ind. 24; *The Indiana, etc., R. R. Co. v. Davis*, 20 Ind. 6; *Fankboner v. Fankboner*, 20 Ind. 62; *The Eaton & Hamilton R. R. Co. v. Hunt*, 20 Ind. 457; *McCullough v. Cook*, 34 Ind. 290; *Mercer v. Patterson*, 41 Ind. 440.

In *Johnson v. Seymour*, *supra*, it was held, that in an action upon a promissory note payable in "wagon work," the time of payment being fixed, no demand was necessary.

The action in *The Indiana, etc., R. R. Co. v. Davis*, *supra*, was based upon an order drawn by the secretary of the railroad company upon the treasurer thereof for the payment of a sum of money actually due the payee from the corporation, and it was held that it was not necessary for the payee to present it to the treasurer at any time before bringing the action, as a condition precedent to suit, but it was held that the defendant might defeat a recovery for costs by proving a readiness to pay at the time and place named; and on the point under examination the following cases were overruled:

*The Wardens, etc. v. Moore*, 1 Ind. 289; *English v. The Board, etc.*, 6 Ind. 437; *The Marion, etc., R. R. Co. v. Dillon*, 7 Ind. 404; *The Marion, etc., R. R. Co. v. Lomax*, 7 Ind. 648; *The Marion, etc., R. R. Co. v. Hodge*, 9 Ind. 163.

In *Fankboner v. Fankboner*, and in *Mercer v. Patterson*, *supra*, it was held that where a note was payable on demand, no demand need be made before suit.

In *The Eaton & Hamilton R. R. Co. v. Hunt*, *supra*; it was held that when a note is made payable at a particular place, a demand of payment there need not precede an action on the note; but if the defendant in such action establishes ability and readiness at the time and place to pay, the plaintiff cannot recover costs.

In *McCullough v. Cook*, *supra*, it was held that in an action upon a promissory note payable in bank against the

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maker alone, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place specified in the note.

On the other hand, it is earnestly contended by counsel for appellants that the rule laid down in the above cases has no application to the present action; that where a bank receives money on deposit in the ordinary way, the depositor cannot maintain an action for it without a previous demand by check or otherwise; and that in this action it was necessary for the appellee to prove a demand of payment and offer to return the certificate, as it was so expressly stipulated in the certificate; and in support of these positions we are referred to several adjudged cases.

In *McEwen v. Davis*, 39 Ind. 109, the following language was used: "When money is deposited with a banker, it is payable on demand, at the bank, unless some other agreement has been made with reference to its payment. The banker is not required to hunt up the depositor and pay him the money, as an ordinary debtor is bound to do with his creditor. The banker may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing. But though the banker may, if he choose, act upon such oral direction, he is under no obligation to do so. By the usages of the banking business he is entitled to demand some written evidence of the order and the payment. A receipt would, of course, be evidence of such payment, and so the check of the depositor will, when paid and in the hands of the banker, be evidence of the order to pay, and also of the fact of payment. *Morse Banks and Banking*, 29."

In *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92, the court say: "Were this a suit against the Bank of Penn Township by the original depositor, the statute of limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a

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Brown *et al.* v. McElroy.

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deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found."

To the same effect are the following cases: *The Union Bank v. The Planters' Bank*, 9 Gill & Johns. 439—461; *Johnson v. The Farmers' Bank*, 1 Harrington, Del. 117—119; *Willets v. The Phoenix Bank*, 2 Duer, 121; *The Farmers and Mechanics' Bank v. The Butchers and Drovers' Bank*, 4 Duer, 219; *Downes v. The Phoenix Bank*, 6 Hill, 297; *Fogarties v. The State Bank*, 8 Am. Law Reg. 393.

We have examined the evidence in the record, and find that there was no proof of a demand of payment and a refusal. The case of deposit seems to be an exception to the rule that obtains in the case of an ordinary promissory note payable on demand. The controversy in the court below seems to have turned upon another question, but the question is made here and arises in the record. It is not a question of a conflict of evidence, but a failure of proof on a vital point.

We think the finding is not sustained by sufficient evidence. Hence, the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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 Selking v. Jones, Adm'r, et al.
 

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## SELKING v. JONES, ADM'R, ET AL.

52	409
136	351
52	409
137	265

**ASSIGNMENT OF ERROR.—*Special Finding.***—Where the court, at the request of a party to an action, has stated the facts in writing and the conclusions of law upon them, no question as to the correctness of the conclusions of law will be presented on appeal by assigning as error that the court erred in its special finding.

**SAME.—*Superior Court.—Supreme Court.***—On an appeal from a superior court to the Supreme Court, only such questions can be considered as were presented by the assignment of errors in the general term of the lower court.

**PARTNERSHIP.—*Payment to One Partner.***—Payment of a debt due to a firm may be received by any one of the partners.

From the Marion Superior Court.

*W. W. Leathers, B. F. Davis, R. A. Black and H. F. Kane*, for appellant.

*J. S. Harvey*, for appellees.

**DOWNEY, J.**—This action was brought by George B. Scribner and Charles H. Scribner, as partners by the name and style of Scribner & Co., against William Selking, the appellant, for personal property sold and delivered by the plaintiffs to the defendant.

The defendant answered:

1. A general denial.
2. Payment.
3. Set-off.

Reply in denial of the second and third paragraphs of the answer.

There was a trial by the court, without the intervention of a jury, and, by request, a special finding was made of the facts, and conclusions of law were stated, to which there was an exception.

The defendant moved the court to grant him a new trial, which motion was overruled, and he again excepted. Final judgment on, and in accordance with, the special finding.

On appeal to the general term of the superior court, it was assigned as error, that the court, at special term, had erred

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Selking v. Jones, Adm'r, *et al.*

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in overruling the motion for a new trial, and in its special finding.

The judgment of the court at special term was affirmed in the general term, and this ruling is here assigned as error.

After the issues had been formed in the special term, the death of George B. Scribner, one of the plaintiffs, was suggested, and Jesse Jones having been appointed administrator of his estate, his name was suggested, and he was made a co-party with the surviving plaintiff. No objection to this was made at the time the order was entered.

We ought, first, to ascertain what questions are presented for our decision. We may say, at the outset, that no question is presented as to the correctness of the conclusions of law. It was assigned as an error in the general term, that the court erred in its special finding. But this relates properly to the facts, and not to the conclusions of law. *The Montmorency Gravel Road Co. v. Rock*, 41 Ind. 263; *Cruzan v. Smith*, 41 Ind. 288.

The question is argued as to the right of Jones, as administrator of George B. Scribner, to unite with Charles H. Scribner in the prosecution of the action, after the death of his intestate.

As we have seen, there was no objection or exception to this action of the court, and, moreover, it seems not to have been a question in the case by any assignment of error in the general term. It is only such questions as were presented by the assignment of errors in the general term that can be considered by this court on appeal.

The sufficiency of the evidence to sustain the finding of the court is denied. The mooted question in the defence was, whether an account claimed by the defendant was properly against the plaintiffs, or against Charles H. Scribner only, and if not properly an account against the firm, whether the items in it were to be regarded as payments on the plaintiffs' account or not. The evidence left the matter in a great deal of confusion and uncertainty. The court allowed the money items as payments, and, acting on the consent of

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Martindale v. Palmer.

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George B. Scribner, gave the defendant the benefit of the amount of the other items, to the extent of one-half of the plaintiffs' claim, and gave the plaintiffs judgment for the balance of the claim sued upon.

We cannot say that the evidence did not justify the finding of facts made by the court. We do not doubt the correctness of the legal proposition contended for by counsel for the appellant, that, of a debt due to a firm, any one of the partners may receive payment. The fact as to whether payment was made to any one is a question concerning which there is a conflict of evidence.

The judgment is affirmed, with costs.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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MARTINDALE v. PALMER.

**CITY.—Ordinance.—Signature of Mayor.—Street Improvement.**—The signature of the mayor of a city incorporated under the general law for the incorporation of cities in this State is not essential to the validity of an ordinance of such city, and, therefore, the fact that an ordinance of such city, under which a street improvement has been made, had not been signed by the mayor at the time the contract for the making of such improvement was let, does not render invalid an assessment against property for such improvement.

**SAME.—Ordinance.**—An ordinance of a city providing for a street improvement is not rendered void for uncertainty by the fact that it is necessary to take together the title and the body of the ordinance referring to the title, to ascertain with certainty what street or part of a street is to be improved.

**SAME.—Ordinance.—Contract.—Kind of Improvement.**—An ordinance providing for a street improvement in a city directed that the street should be paved with "Nicholson or wooden block pavement," and the contract was for "what is known as wooden block pavement."

**Held,** that it was not necessary that the contract should literally follow the ordinance, it being sufficient that the pavement contracted for corresponded in kind with that provided for in the ordinance.

52	411
198	508

52	411
131	111

52	411
148	33
148	237

52	411
160	485
160	486

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Martindale v. Palmer.

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**SAME.**—*Appeal from Precept.—Advertisement.*—On an appeal from a precept issued to collect the amount of an assessment against property for a street improvement, the insufficiency of the advertisement to receive proposals to do the work cannot be inquired into as a fact.

**SAME.**—*Precept.—Sale of Several Lots Together.*—A precept was issued, upon regular affidavits, for the collection of a certain sum in gross, being the amount of assessments properly made on two lots in a city, owned by one person, for a street improvement, and in default of payment the precept commanded the sale of both lots, without distinguishing the separate amounts due on each lot, and without requiring each lot to be sold separately to pay its own assessment.

*Held*, on appeal from the precept, that it was not void, but only voidable, and could have been amended by the assessments and affidavits, and that a sale of both lots thereunder without objection would have been good.

**SAME.**—*Appeal from Precept.—Answer.—Nul Tiel Record.*—On an appeal from a precept issued on an assessment for a street improvement, an answer of *nul tiel record* cannot put in issue any fact which preceded the contract.

**PRACTICE.**—*Setting Aside Judgment and Finding, and Making Another Finding, Without Motion.*—Upon the trial of a cause by the court, there was a general finding for the defendant, and final judgment for costs was rendered against the plaintiff, and several days afterwards the court, without request from either party to make a special finding before made, without any motion for a new trial, and without any written motion made in the cause, set aside said judgment and general finding, and, over the objection of the defendant, without hearing evidence or having a new trial, made a special finding in favor of the plaintiff.

*Held*, that such a practice could not be sustained.

From the Marion Civil Circuit Court.

*J. T. Dye* and *A. C. Harris*, for appellant.

*C. P. Jacobs*, for appellee.

**BIDDLE, J.**—Appeal from a precept issued by the mayor of the city of Indianapolis to collect the amount of certain assessments against the property of the appellant for street improvements. Proceedings were had, and a final decree rendered ordering the sale of the property to pay the assessments. We do not notice all the proceedings in detail, but only such as were excepted to by the appellant, and are insisted upon in his brief as erroneous.

1. It is urged that the ordinance under which the improvements were made was not in force at the time the contract

was let, because it had not been signed by the mayor. This question is presented by the second paragraph of the answer and also by the offer to prove the fact at the trial. The court held, on demurrer, as well as at the trial, that it was not necessary to the validity of the ordinance that it should be signed by the mayor. Section 78 of the statute under which the city of Indianapolis, as a municipal corporation, is organized, provides, that "all by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk. On the passage or adoption of any by-laws, ordinances, or resolution, the yeas and nays shall be taken and entered on the record." The act nowhere requires the signature of the mayor to give validity to an ordinance.

The doctrine of the English courts as to the old corporations in that country, that the mayor was an integral part of the corporation, and that the acts of the corporation in his absence were invalid, has, it is believed, no application to the office of mayor in this country. With us, the powers and duties of the mayor depend entirely upon the provisions of the charter, or the act under which the corporation is organized, and the by-laws passed in pursuance of such authority. Properly and primarily, the powers and duties of a mayor are executive and administrative, and not judicial or legislative; but other powers may be, and often are, granted to him, and other duties enjoined upon him. Whether the mayor's signature is essential to the validity of an ordinance depends upon the charter, or the act authorizing the organization of the corporation, but, unless it is made essential, it has generally been held merely directory. The mayor, or presiding officer of the city of Indianapolis, by the section cited, is required to sign all ordinances recorded in a book kept for that purpose, *within a reasonable time after their passage*. This would seem to imply that his signature is not essential to the *passage* of an ordinance; if it were so, it would be useless to sign it again

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Martindale v. Palmer.

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after it was recorded, as the record must necessarily show the signature as having been made before the ordinance was recorded. Besides, the latter part of the section strongly implies that the validity of the passage or adoption of an ordinance depends upon the yeas and nays, taken and entered on the record, without the signature of the mayor. We are therefore conducted to the conclusion that the signature of the mayor, or presiding officer of the city of Indianapolis, is not essential to the validity of an ordinance properly passed by the corporation, however necessary it may be to the authentication of an ordinance in its book of records. And we think the following authorities fully consider and sustain the above views:

*Elmendorf v. The Mayor, etc., of New York*, 25 Wend. 693; *Miles v. Bough*, 3 Gale & D. 119; *Striker v. Kelly*, 7 Hill, 9; *Conboy v. Iowa City*, 2 Iowa, 90; *The State v. The Mayor, etc.*, 1 Dutcher, 399; *The San Francisco Gas Co. v. The City, etc.*, 6 Cal. 190; *Blanchard v. Bissell*, 11 Ohio St. 96; *Kepner v. The Commonwealth*, 40 Penn. St. 124; *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 240; 1 Dillon on Municipal Corp., sections 147, 209, 265, 266; *The Board, etc., v. Silvers*, 22 Ind. 491; *Hellenkamp v. The City of Lafayette*, 30 Ind. 192; *Balfe v. Johnson*, 40 Ind. 235; *Brookbank v. The City of Jeffersonville*, 41 Ind. 406.

2. The appellant insists that the ordinance is void for uncertainty, because it does not declare what street was to be improved, nor what part of any street. The title of the ordinance is as follows:

“An ordinance to provide for grading and paving with wooden block pavement Market street, between Pennsylvania and Delaware streets.”

It then ordains as follows:

“Section 1. Be it ordained by the Common Council of the city of Indianapolis that the above named street, between the points named, be properly graded according to the stakes set by the chief engineer, and that the same be paved with

the Nicholson or wooden block pavement, and that the expense," etc.

Taking the title and the ordinance together, we think there is no uncertainty as to what street, or part of a street, was to be graded and paved. That which can be made certain is certain. The same principle, as applicable to grades of certain streets, was settled in *Burr v. The Town of Newcastle*, 49 Ind. 322.

3. It is claimed by the appellant that the street under the ordinance could be improved only with a "Nicholson or wooden block pavement," and as the contract was for "what is known as wooden block pavement," that he is, therefore, not liable.

The petition to the council, signed by the appellant and others, was for "what is known as wooden block pavement;" the title of the ordinance, as we have seen, was "an ordinance to provide for grading and paving with wooden block pavement;" the body of the ordinance described it as the "Nicholson or wooden block pavement;" the notice to contractors for proposals was for "paving with wooden block pavement;" the contract, as stated, was for "what is known as wooden block pavement;" and the work was done with "wooden block pavement (Ballard's patent)." These several kinds of pavement belong to the same class. The council was not bound to literally follow the petition or the ordinance. It was sufficient if they corresponded in kind. Of course, they could not authorize the construction of a stone pavement, and then put in wooden pavement; but when they authorize the construction of a "wooden block pavement," the difference between Nicholson's and Ballard's patents is not material.

The case of *The State v. The Mayor and Common Council of the City of Hudson*, 5 Dutcher, 104, was brought to set aside an ordinance passed by the common council of the city of Hudson for regulating and grading Palisade Avenue, and to set aside the assessments made under its authority. In

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*Martindale v. Palmer.*

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these two points the case was the same as the one we are considering.

The remarks of OGDEN, J., in delivering the opinion of the court, are so apt and practical, in the application of the law to the affairs of men, that we adopt them as our own. He says:

“The object of an advertisement was the giving of information that an improvement was asked for, which would affect the interests of the owners of real estate that would be benefited by the same, so that they could appear before the council, or its committee, and make objections or suggestions. It would be an unfair interpretation of the intent of the legislature to say that the petitioners for improvements, in opening, and in grading and paving streets, can confine the common council to the particular manner of improvement which they may choose to ask for. If such is a fair construction of the section, and several combinations of property holders should present to the council their separate applications for the improvement of a street from one given point to another, but each naming a particular and distinct mode of improvement, the common council could not act, because they could not adopt each plan, and thus all improvement could be prevented. The proposition should be for some class or classes of improvement, which must be advertised; but the mode in which the improvement shall be made, and its extent, should be left to the discretion of the common council; therefore the fact that some of the petitions asked for plank sidewalks of a given width and description, and others did not, cannot invalidate the last general ordinance, which provides for the laying of sidewalks on both sides of the avenue.”

The authorities cited by appellant, 2 Dillon Mun. Corp., secs. 60, 603, 618, and notes, go to show that a common council cannot delegate their official powers to other persons, but not to the latitude of discretion they have in the exercise of their powers themselves. In this, we think, the authorities are not in point.

The appellant also complains because the court held the

fifth paragraph of answer, setting up the facts urged under this head, good on demurrer, and afterwards, when the facts were proved on trial, regarded them as an insufficient defence.

We have examined the fifth paragraph carefully, and consider it insufficient; but holding it to be good by the court is not an error of which the appellant, who pleaded it, can complain; nor is it an error for which the judgment should be reversed, if it is right upon the whole record.

4. To the first transcript filed by the appellee, on appeal, a demurrer was sustained. He afterwards filed an amended transcript, to which a motion to strike out was overruled. The appellant does not deny but that a record may be amended while the case is pending, but insists that the proper practice is to have the omitted parts attached to the record on file; and he admits that "this is only a technical point," and virtually abandons it, and we think very sensibly.

A demurrer was also overruled to the amended transcript. There is no error in this ruling. The transcript is sufficient. On trial, the appellant objected to the admission of the transcript as evidence. "The court said, so much of the record as was before the contract required no proof, and was of itself to be taken without proof, and was in the case, and the remainder incompetent evidence." What part of the transcript was held unnecessary, and what part incompetent, are not made to appear; and what point the appellant has raised, when his own objection was sustained in full, we do not perceive.

Under this head, the appellant also discusses the insufficiency of the advertisement to receive proposals to do the work. This cannot be inquired into as a fact, as the statute expressly provides, "that no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council." Sec. 71, 3 Ind. Stat. 102; *The City of Indianapolis v. Imberry*, 17 Ind. 175.

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Martindale v. Palmer.

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5. The assessment on lot nine was for four hundred and sixty-four dollars and forty cents; on lot eight, for three hundred and nine dollars and sixty cents. The precept issued for seven hundred and seventy-four dollars, the sum in gross, and, in default of payment, commanded the sale of both lots, without distinguishing the separate amounts due on each lot, and without requiring each lot to be sold separately to pay its own assessment. The court found the assessments properly made, and the affidavits authorizing the precept regular, but held the precept "irregular, illegal and void." We do not think the precept was void, but only voidable. If it was void, no appeal from it would lie. It seems to us that a sale under it, without objection, would have been good. The case of *Balfe v. Johnson*, 40 Ind. 235, cited by the appellant, does not declare such a precept void, but decides that the assessments must be made upon each separate lot, or piece of ground, as was done in the present case. We think the precept in this case could have been amended by the assessments and affidavits. The affidavits authorize the precept as a judgment authorizes an execution; indeed, the precept is strongly analogous to an order of sale under a chancery proceeding decreeing separate amounts due against specific pieces of property, and ordering a sale accordingly. In such cases, the execution, or order of sale, may be corrected by the judgment or decree, even after sale. *Doe v. Rue*, 4 Blackf. 263; *Doe v. Harter*, 1 Ind. 427; *Doe v. Harter*, 2 Ind. 252; *Doe v. Dutton*, 2 Ind. 309. But, as a general rule, an application to amend such a writ should be made before suit is brought.

6. The fourth paragraph of answer is *nul tiel record*. A demurrer was properly sustained to it for want of sufficient facts. It puts nothing in issue which decides the case. It does not deny the contract to do the work, nor that the work was done; and the facts which precede the contract, as we have seen, cannot be tried. There may be no such record, that is, no such record technically, and yet the appellee have the right to recover.

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Trueblood *et al.* v. Nicholson *et al.*

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7. It is shown in the record, by a bill of exceptions, that after issue joined, the trial of the cause was submitted to the court; that the court found generally for the appellant, and rendered final judgment for costs against the appellee; that the court, several days after such general finding and judgment for costs, without any request from either party to make a special finding before made, without any motion for a new trial having been made, and without any written motion made in the cause, set aside such judgment for costs and general finding, and, over the objection of appellant, without hearing evidence or having a new trial, made a special finding in favor of appellee, and decreed the sale of said lots to pay their respective assessments, with costs, etc., to all of which the appellant excepted at the time.

Such a practice cannot be sustained. It is expressly held otherwise, and the reasons fully given, in *Wright v. Hawkins*, 36 Ind. 264.

8. The last proposition questions the sufficiency of the evidence to support the finding. Upon this point we express no opinion.

The judgment is reversed, with costs. Cause remanded for further proceedings.

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TRUEBLOOD ET AL. v. NICHOLSON ET AL.

From the Washington Circuit Court.

*H. Heffren, J. E. McDonald and J. M. Butler*, for appellants.

*S. L. Collins, A. B. Collins and J. R. Troxwell*, for appellees.

PETTIT, C. J.—The submission in this case is set aside for not complying with rule 19 of this court, in numbering the pages of the transcript and the lines of each page, at the costs of the appellants.

Opinion filed May term, 1875.

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The Board of Commissioners of Marion County *v.* Smith.

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TRUEBLOOD ET AL. *v.* NICHOLSON ET AL.

**BILL OF EXCEPTIONS.**—*Time of Filing.*—Where time after the term has been given in which to file a bill of exceptions, a paper purporting to be a bill of exceptions cannot be regarded as a part of the record, if it does not appear that it has been filed, and when it was filed.

From the Washington Circuit Court.

*H. Heffren, J. E. McDonald and J. M. Butler*, for appellants.

*T. L. Collins, A. B. Collins and J. R. Troxell*, for appellees.

**DOWNEY, C. J.**—This was an appeal to the circuit court from the action of the board of commissioners of the county, in a proceeding to change the location of a highway. In the circuit court the appeal was dismissed. Exception was taken, and ninety days were allowed by the court in which to file a bill of exceptions. There is a bill of exceptions in the record, but whether it was ever filed or not, or if it was filed, when, does not appear. There is no question argued that arises without a bill of exceptions. The bill of exceptions cannot be regarded as properly a part of the record, for the reason stated. *Jeffries v. McNamara*, 49 Ind. 142. There are many other cases to the same effect.

The judgment is affirmed, with costs.

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125	529
52b	420
141	647
141	652
142	257

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THE BOARD OF COMMISSIONERS OF MARION COUNTY *v.*  
SMITH.

**SCHOOL LAW.**—*Amendment of Statute.*—The act of March 8th, 1873, amending sections 33, 37, 39 and 43 of the common school law of March 6th, 1865, is still in force, and the act of March 9th, 1875, purporting to amend the same sections (which, having been amended by said act of 1873, had ceased to exist, and therefore were not subject to amendment), is void.

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Willey v. The State;

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From the Marion Superior Court.

*L. Barbour*, for appellant.

*Buchanan, Williams & Whitehead*, for appellee.

BUSKIRK, J. — The appellee presented to the appellant his claim for services rendered by him as county superintendent. The claim was disallowed. Appeal to the superior court, where the claim was allowed.

It is conceded that the judgment should be affirmed, if the act of March 8th, 1873, amending sections 33, 37, 39 and 43 of the common school law of March 6th, 1865, is still in force. On the other hand, it is admitted that the judgment must be reversed, if the act of March 9th, 1875, purporting to amend the same sections of the school law, is valid.

The act of 1873 amended certain sections of the school law of 1865. The sections amended ceased to exist, and were not subject to amendment. The act of 1875 should have amended the act of 1873. This question was recently very fully considered, and decided adversely to the appellant. *Blakemore v. Dolan*, 50 Ind. 194. See Buskirk's Prac. 172.

The judgment is affirmed, with costs.

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WILLEY v. THE STATE.

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CRIMINAL LAW.—*Practice.*—*Statement of Case to Jury.*—In a criminal action, after the prosecuting attorney had, at the proper time, stated the case to the jury, the defendant's attorney asked leave to be allowed to reserve the statement of the defendant's defence until the State had offered the evidence for the prosecution; but the court ruled that he must then state the defendant's defence, or not at all, and refused to allow him to reserve such statement until after the evidence for the prosecution had been offered and to then make the statement; but there was no offer made, after the prosecution had closed, to make a statement of the defence.

*Held*, that this ruling was erroneous. (BIDDLE, J., dissented, holding that

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Willey v. The State.

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the defendant waived his right to make such statement by not making his offer at the proper time, which was after the introduction of the evidence for the prosecution.)

From the Carroll Circuit Court.

*H. C. Thornton* and *A. H. Dame*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

BIDDLE, J.—The appellant, Sylvester Willey, and Sarah Willey were indicted in the White Circuit Court for the murder of Mary L. Willey, a pregnant woman, by procuring a miscarriage upon her body. The venue was changed to the Carroll Circuit Court, wherein they jointly filed a plea in abatement to the indictment. A demurrer to the plea in abatement was filed, sustained, and exception saved. A motion to quash was overruled, and exception saved. Joint plea of not guilty. The appellant was tried separately by a jury, and found guilty as charged. His punishment was made imprisonment in the State's prison for the term of twelve years. Motion for a new trial; causes filed as follows:

1. Sustaining the demurrer to the plea in abatement.
2. Overruling the motion to quash the indictment.
3. The verdict is contrary to evidence.
4. The verdict is contrary to law.
5. Not allowing the appellant, on motion made before any evidence was given on the trial, to reserve the statement of his defence until the evidence had been offered in support of the prosecution.
6. Admitting certain evidence, stated, over the objection of the appellant.
7. The insufficiency and uncertainty of the verdict.
8. Giving instructions to the jury.
9. Giving instructions to the jury asked for by the State.
10. Misdirecting the jury during the trial, in giving certain instructions.
11. Misdirecting the jury in giving certain other instructions.

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Willey v. The State.

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The motion for a new trial and a motion in arrest of judgment were overruled, and exceptions reserved.

The questions of the insufficiency of the plea in abatement, and the sufficiency of the indictment, were settled by this court in a previous case, *Willey v. The State*, at the November term, 1875, *ante*, p. 246. We need not, therefore, consider them in this case. The motion in arrest was properly overruled. We can see no ground for it whatever. The first and second reasons assigned are not causes for a new trial. They could not be corrected, if erroneous, by a re-examination of the issues. 2 G. & H. 423.

As a basis of the fifth cause for a new trial, the bill of exceptions states, that after arraignment and plea of not guilty, and after the jury was empanelled, "the prosecuting attorney then stated the case to the jury, and H. C. Thornton, attorney for the defendant, asked leave of the court to be allowed to reserve the statement of the defendant's defence until the State had offered the evidence in support of the prosecution, but the court ruled that he must then state the defendant's defence, or not at all, and refused to allow him to reserve the statement of the defence until after the evidence had been offered in support of the prosecution, and would not allow him to state the defendant's defence after the evidence in support of the prosecution had been offered, and there was no offer made to make a statement of the defence after the prosecution had closed; to which ruling of the court the defendant excepted at the time, and doth now except."

The statute governing trials in criminal cases is as follows:

"Sec. 103. The jury being empanelled and sworn, the trial may proceed in the following order:

"1. The prosecuting attorney must state the case, and offer the evidence in support of the prosecution.

"2. The defendant, or his counsel, may then state his defence, and offer evidence in support thereof.

"3. The parties may then, respectively, offer rebutting testimony only, unless the court, for good reason, in further-

ance of justice, permit them to offer evidence upon their original case.

"4. When the evidence is concluded, the prosecuting attorney and the defendant or his counsel may, by agreement in open court, submit the case to the court or jury trying the same, without argument, but if the case is not so submitted without argument, the prosecuting attorney shall have the opening and closing of the argument, but he shall disclose in the opening all the points relied on in the case, and if in the closing, he refers to any new point or fact not disclosed in the opening, the defendant or his counsel shall have the right of replying thereto, which reply shall close the argument in the case. If the prosecuting attorney shall refuse to open the argument, the defendant or his counsel may then argue the case, and that shall be all the argument allowed in the case.

"5. The court must then charge the jury, which charge, upon the request of the prosecuting attorney, the defendant or his counsel, made at any time before the commencement of the argument, shall be in writing, and the instructions therein contained numbered and signed by the court.

"6. If the prosecuting attorney, the defendant or his counsel, desire special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party, or his attorney, asking them, and delivered to the court before the commencement of the argument." Acts 1873, p. 183; Buskirk's Prac. 403.

Under this statute, the majority of the court are of the opinion that the circuit court erred in the above ruling, and that its judgment must therefore be reversed. This conclusion renders it unnecessary for us to examine the remaining errors assigned.

The judgment is reversed; cause remanded, with instructions to grant the motion for a new trial.

The clerk will make the proper order for the return of the prisoner.

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Willey v. The State.

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BIDDLE, J., dissents. I do not concur in the above opinion. If the appellant desired to state his defence before he offered evidence in support of it, he should have offered to do so after the State had introduced her evidence in support of the prosecution, as the code directs. Acts 1873, p. 183. If, then, the court had denied him the right to do so, the question would have been fairly presented. Not having done so, he should be held to have waived the right. What the court decided before the State had introduced any evidence in support of the prosecution was, at most, but an irregularity, for which the judgment ought not to be reversed. The appellant's motion to reserve the right to state his defence after the evidence for the prosecution had been heard, was no more than reserving the law, and was out of place in time. It did not prevent him from making the motion at the proper time, nor bind the court from granting it at the proper time; and, if an error, it is one which could have been corrected in that court, on proper application, made at the proper time. The appellant, not having made such application, and not having given the court below the opportunity to correct the error, is not entitled to avail himself of it in this court. This principle has been decided again and again. *Prather v. Rambo*, 1 Blackf. 189; *Findley v. Bullock*, 1 Blackf. 467; *Priddy v. Dodd*, 4 Ind. 84; *Coleman v. Dobbins*, 8 Ind. 156; *Boggs v. The State*, 4 Ind. 463; *Ellis v. Miller*, 9 Ind. 210; *Manly v. Hubbard*, 9 Ind. 230; *Lackey v. Hernby*, 9 Ind. 536; *Wolcott v. Yeager*, 11 Ind. 84; *Boxly v. Carney*, 14 Ind. 17; *Rowe v. Haines*, 15 Ind. 445; *Smith v. Allen*, 16 Ind. 316; *Evey v. Smith*, 18 Ind. 461; *Gibson v. Green*, 22 Ind. 422; *Marcus v. The State*, 26 Ind. 101; *Sharp v. Flinn*, 27 Ind. 98; *Watts v. Green*, 30 Ind. 98; *Hamrick v. The Danville, etc., Gravel Road Co.*, 32 Ind. 347; *Sutherland v. Venard*, 32 Ind. 483; *Feriter v. The State*, 33 Ind. 283; *Irvinson v. Van Riper*, 34 Ind. 148.

“The general rule is, that objections which, by any legal possibility, might have been obviated or remedied, if the

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Lyons v. The State.

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objections had been, but were not, urged in the court below, are deemed to have been waived, and cannot be raised for the first time on appeal." Buskirk's Prac. 288.

It seems to me that the remedy for the objection which reverses this judgment was not only within the range of legal possibility, but quite within easy practicability, and should have been applied for in the court below.

The statute provides that the prosecuting attorney "must state the case," etc. The purpose of the mandatory word "must" is very plain, namely, to prevent concealment, and insure a fair trial to the defendant. The language as to the right of the defendant to state his case is, that he "may then state his defence," etc. The directory word "may" leaves it entirely optional with the defendant to state his defence or not. The appellant in this case did not ask the circuit court to be allowed to state his defence at the time the law gives him the right to do so, but now asks this court to reverse the judgment because of his own neglect. So close and literal a construction of a directory statute giving an optional right will render convictions for crime impracticable; and if convictions cannot be obtained simply because the accused neglects or refuses to avail himself of his own rights at the proper time, they will become impossible.

In my opinion, the judgment should be affirmed.

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LYONS v. THE STATE.

CRIMINAL LAW.—*Abduction for Prostitution.—Evidence.*—To sustain a prosecution for the abduction of a female for the purpose of prostitution, under section 16, 2 G. & H. 441, the female must have possessed actual personal virtue, and therefore acts of illicit sexual intercourse committed by her previous to the alleged abduction may be shown in evidence on behalf of the defendant.

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Lyons v. The State.

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From the Franklin Circuit Court.

*W. H. Jones, W. H. Bracken and B. F. Davis*, for appellant.

*C. A. Buskirk*, Attorney General, *S. E. Urmston* and *S. S. Harrell*, for the State.

DOWNEY, C. J.—This was a prosecution for abduction, under sec. 16, p. 441, 2 G. & H. The defendant was convicted and sentenced to the State's prison: The refusal of the court to quash the indictment, and the overruling of the defendant's motion for a new trial, are assigned as errors. We see no valid objection to the indictment. There is a little surplusage in its allegations, but it is good notwithstanding.

On the trial, the defendant proposed to prove acts of illicit sexual intercourse on the part of the prosecuting witness prior to the alleged abduction, but the court rejected the evidence. We think this was an error. In such a case the female must be of "previous chaste character." This has been held to mean that she shall possess actual personal virtue in distinction from a good reputation. A single act of illicit connection may, therefore, be shown on behalf of the defendant. Bishop Statutory Crimes, sec. 639; *Carpenter v. The People*, 8 Barb. 603; *Kenyon v. The People*, 26 N. Y. 203; *The State v. Shean*, 32 Iowa, 88; *Andre v. The State*, 5 Iowa, 389; *Boak v. The State*, 5 Iowa, 430.

The preceding section relating to seduction is different. It only requires that the female shall be "of good repute for chastity."

The authorities cited by the State do not bear on the exact question under consideration.

The judgment is reversed, and the cause remanded, for a new trial. The clerk will certify to the warden of the state prison as required by law.

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The Indianapolis, Bloomington and Western Railway Co. *v.* Smith *et ux.*

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THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAIL-  
WAY COMPANY *v.* SMITH ET UX.

RAILROAD. — *Street.* — A railroad company is liable in damages for injury occasioned by reason of the construction of a raised railroad track along a street of a city, thereby causing the water from rains and freshets to flow upon adjacent real estate, and also for injury occasioned by reason of the construction of an embankment, on a street approaching a street crossing of said track, in front of a lot in a city occupied by a dwelling-house, thereby rendering the approach to the lot in the front on such street impossible for carriages, wagons and vehicles and inconvenient for foot-passengers.

From the Montgomery Circuit Court.

*C. W. Fairbanks*, for appellant.

PETTIT, J.—This suit was brought by the appellees, Ann M. Smith and her husband, Samuel D. Smith, against the appellant and the city of Crawfordsville, to recover for damage done to the real property of the female appellee, in and by the construction of the appellant's road, its ditches and embankments.

The city demurred to the complaint for want of sufficient facts, which was sustained, thus putting the city out of the case. Proper issues were formed between the appellant and appellees. The case was submitted to the court, with a request that the court should find specially the facts and the conclusions of law thereon, which was done, as follows:

"1. That the plaintiff Samuel D. Smith is the husband of the plaintiff Ann M. Smith; and that the said Ann M. Smith, on the 25th day of March, 1862, became the owner of the real estate described in the complaint as lot No. 3, in Coon & McMullen's addition to the city of Crawfordsville, in Montgomery county, Indiana, upon which lot is situated a dwelling-house, occupied as a residence by the plaintiffs, and which lot is marked 'A' on the accompanying diagram, and which fronts on Walnut street, in said city, for a distance of forty feet, on the east side of said street, and immediately north of said lot, and between it and Franklin street, are certain lots fronting on Walnut street, a distance of

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The Indianapolis, Bloomington and Western Railway Co. *v.* Smith *et ux.*

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eighty feet, which lots now belong to, and were purchased by, the railroad company since the construction of their railroad, and which lots are marked 'B' on the accompanying diagram.

"2. That, prior to the construction of the defendant's railroad, the grade of Walnut street was established and fixed, and also the sidewalks thereof, and the street gravelled and improved, and the plaintiff purchased her real estate after such grade was established and street improved; that the grade of the street, prior to the construction of the railroad in front of the plaintiff's lot, was, in the center of the street, about eight inches higher than the level of the sidewalk in front of said lot, and between the carriage way in said street and the sidewalk was a ditch or gutter about eight inches lower than the sidewalk, and that the front of said lot was free of access to pedestrians, and approachable, without obstruction, by teams and vehicles.

"3. That the railroad of the defendant, The Indianapolis, Bloomington and Western Railway Company, was constructed on and along Franklin street, in said city; that, prior to the construction of said railroad, the city of Crawfordsville passed the several ordinances, as set out in the complaint, and the railway company succeeded to all the rights and privileges granted by said ordinances, and accepted the conditions and obligations of the same as set out in the complaint, and the railroad track, marked on the accompanying diagram, was laid and constructed on or about the — day of —, 18—.

"4. That, prior to the construction of said railroad, Franklin street had not been improved, nor the grade of the same established, by said city of Crawfordsville.

"5. That, prior to the construction of said railroad and before the laying out and improving of either Franklin or Walnut streets, the surface water, accumulating from rain-falls, passed down and along the line marked 'D' on the accompanying diagram; that, after said streets and abutting lots were laid out and occupied, and before the construction

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The Indianapolis, Bloomington and Western Railway Co. *v.* Smith *et al.*

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of the railroad, the main body of said accumulating surface water ran down and along the line marked 'E' on said diagram, and the said water accumulating west of the line marked 'E,' on the south side of Franklin street, ran west on and along the line marked 'F' on said diagram, to its intersection with line 'E,' on Walnut street, the ditch along line 'F' having been constructed by one Cox, who, prior to the construction of the railroad, owned lots 'B,' and in times of freshet or unusual rains some water overflowed and passed from line 'F,' down and along line 'D.'

"6. That at the point 'G,' on said diagram, being the center of the railroad track and of the crossing of Franklin and Walnut streets, the top of the grade of said railroad track is eight and two-tenths feet above the level of the plaintiff's lot, and about six feet above the original grade of Walnut street, at said point, marked 'G.'

"7. That the said railroad company so constructed the grade of her railroad and laid her track on and along Franklin street, eastward from the point marked 'G,' in such manner that all the surface water accumulating south of said track and eastward along the south line of said street for a distance of one thousand feet from the northeast corner of lots 'B,' flows west along the south side of Franklin street and enters lots 'B' at or about their northeast corner, and flows along line marked 'H' on said diagram, across lots 'B' and upon the lot of plaintiff, overflowing the same, and causing the water to flow over and upon said lot, and around, and under, and in front of the dwelling-house on the same, on one or more occasions since the construction of the railroad, to the depth of about eighteen inches, and on other occasions to a depth of three inches and over, destroying the use of the rear portion of said lot as a garden, and otherwise damaging the same.

"8. That after the defendant constructed her railroad from the point 'G,' on said diagram, the railroad company constructed an embankment or approach to said crossing,

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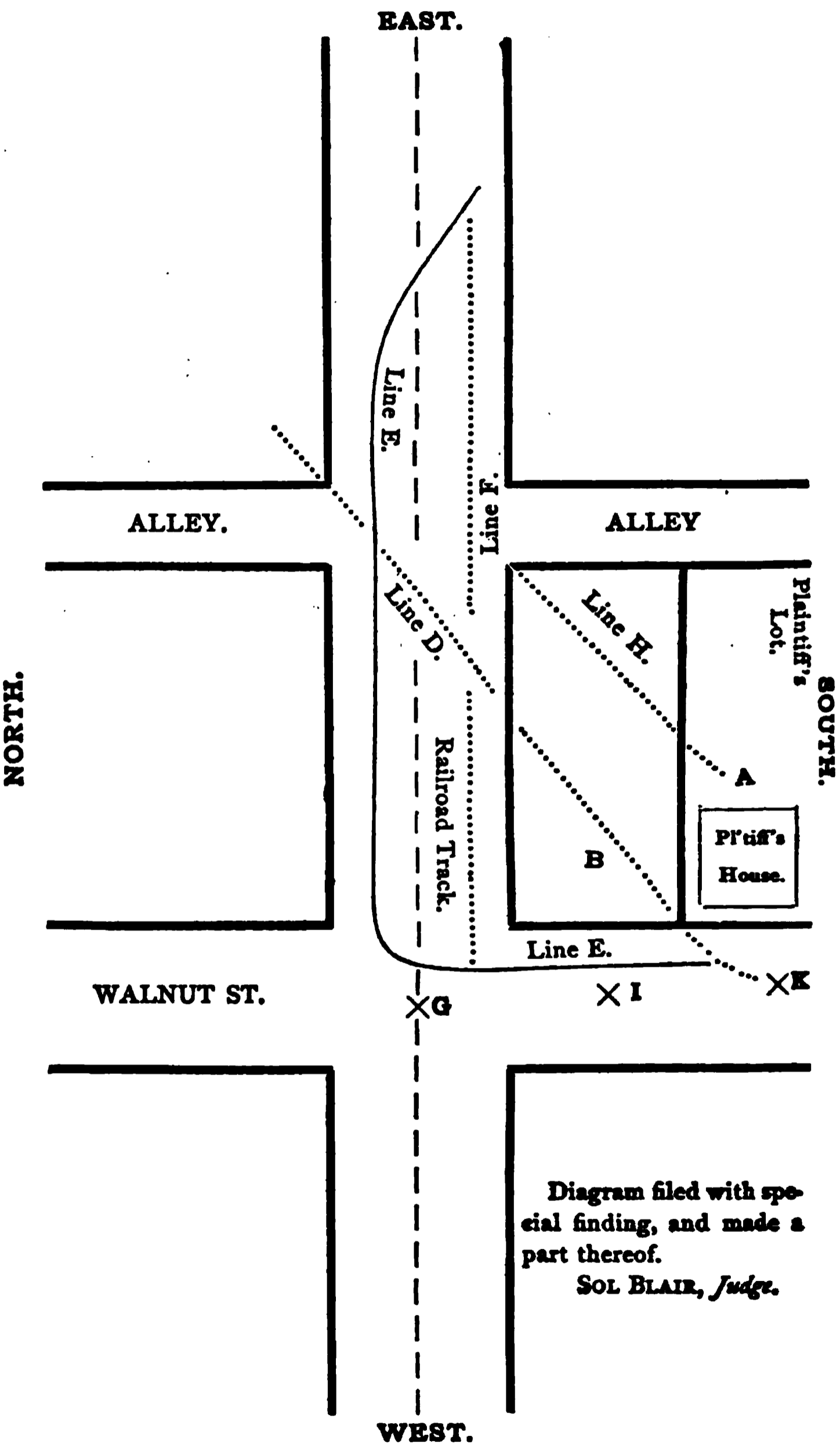
The Indianapolis, Bloomington and Western Railway Co. *v.* Smith *et al.*

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extending southward on Walnut street, to the point marked 'I,' a distance of about fifty feet from the point marked 'G;' that said embankment was too steep for the use of loaded wagons and teams crossing over said railroad track in passing on and along Walnut street, and when muddy it was not sufficient even for lighter vehicles; that said embankment was not gravelled by the railroad company, but was made of clay. But said embankment was not more steep than some other embankments, or approaches, at crossings of said railroad; that Walnut street was and is the principal thoroughfare for persons and teams approaching the city of Crawfordsville from the west and southwest, and is and was much used as such.

"9. That afterwards, the city of Crawfordsville caused to be constructed a further embankment extending southward along Walnut street from the point 'G,' a distance of two hundred and forty feet, to the point 'K,' and that said embankment in front of the center of the lot of the plaintiff is three feet and two inches above the level of said front, and in front of the north line of plaintiff's lot it is four feet and three inches above said level, and the side of said embankment facing the property of the plaintiff is too steep for teams, carriages, and other vehicles to pass up or down, and the front of the plaintiff's lot is rendered inaccessible to such vehicles, there not being room enough to turn a wagon or buggy between the said embankment and the side embankment and the sidewalk in front of the plaintiff's lot. And said embankment and grade of the railroad renders the approach to said lot and dwelling-house from the front difficult and inconvenient for foot-passengers; that the making of said embankment by the city was rendered necessary to enable wagons and vehicles passing on and along Walnut street to pass over the grade of the railroad track on said street, and said embankment is no greater or higher than was necessary for the free use of said street by the public.

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"10. That the said embankment was made by direction of the common council of the city of Crawfordsville, but not by the passage of an ordinance providing for the improvement of the street, and the railroad company, under threats of a suit by said city and under protest, paid the said city the cost of said embankment so made, to wit, the sum of five hundred dollars.

"11. That the point 'K,' marked on said diagram, as the southern terminus of the embankment made by the city, is eleven feet and ten inches lower than the grade of the railroad track at the point 'G.'

"12. The dwelling-house of the plaintiff occupies almost the entire front of the plaintiff's lot, and there is no drive or wagon way from the street to the rear of plaintiff's lot along or across said lot.

"13. That by reason of the construction of the railroad track along Franklin street in the manner in which it is constructed, causing the water to flow upon the lot of the plaintiff as before stated, and by reason of the construction of the embankment on and along Walnut street in front of the plaintiff's lot, thus rendering the approach to said lot in the front impossible for carriages, wagons or vehicles, and difficult and inconvenient for foot-passengers, the lot of the plaintiff and the improvements thereon have been damaged in the sum of five hundred dollars.

"14. As a conclusion of law, arising from the foregoing facts, the court finds that the defendant, The Indianapolis, Bloomington and Western Railroad Company, is liable to the plaintiff for the damages to the said lot and dwelling-house of the plaintiff, and that the plaintiffs are entitled to have and recover of the said defendant the said sum of five hundred dollars, their damages aforesaid. SOL BLAIR, Judge."

The only question before us is, do the facts found justify the conclusion of law arrived at by the court? The findings substantially cover the allegations of the complaint, and there is no objection made as to its sufficiency.

McConnell v. Martin *et ux.*

The thirteenth special finding clearly shows that the damage to the plaintiffs' property was caused by the action of the railroad company, and we hold that, on the whole case, the conclusion of law was right and proper. *Cox v. The L., N. A. & C. R. R. Co.*, 48 Ind. 178.

The judgment is affirmed, at the costs of the appellant.

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## McCONNELL v. MARTIN ET UX.

**WITNESS.—*Husband and Wife.***—On the trial of an action brought by a husband and wife to recover the possession of real estate to which the plaintiffs claimed title under a conveyance made to them jointly, both the husband and the wife were competent witnesses for the plaintiffs to disprove the charge that said conveyance was made to the plaintiffs jointly to defraud creditors of the husband.

**HUSBAND AND WIFE.—*Conveyance.—Fraud.***—Where real estate has been conveyed to a husband and wife, such real estate cannot, in the absence of fraud, be sold on execution under a judgment rendered against said husband after said conveyance, for a debt contracted by him before the conveyance.

**SAME.—*Evidence.***—In determining the question whether said conveyance was made to the husband and wife jointly for the purpose of defrauding creditors of the husband, the amount and value of his property at the time of the conveyance are proper matters of inquiry, and the fact that at that time he had other property sufficient to pay his debts is admissible in evidence.

**SAME.—*Wife's Separate Property.***—Where a husband and wife united in conveying real estate which was the separate property of the latter, in exchange for other real estate, under an agreement that the title to that received should be taken in her name, and, without her knowledge or consent, said title was taken in the name of the husband, and the real estate so received was exchanged by said husband and wife, with money belonging to the husband, for other real estate, the title of which was taken in the names of the husband and wife jointly, the real estate so last transferred by them could not be regarded as the property of the husband in considering the question whether or not the title of the real estate for which it was exchanged was taken in the names of the husband and wife for the purpose of defrauding creditors of the husband.

From the Tippecanoe Circuit Court.

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McConnell v. Martin *et ux.*

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R. C. Gregory, W. B. Gregory and W. C. Wilson, for appellant.

H. F. Blodgett and F. B. Everett, for appellees.

DOWNNEY, C. J.—This was an action by the appellees against the appellant, to recover the possession of certain real estate. The action was commenced in Benton county, and went by change of venue to Tippecanoe. The answer was a general denial. There was a trial by a jury, and a verdict for the plaintiffs. A motion by the defendant for a new trial was overruled, and there was final judgment for the plaintiffs.

There is but one error assigned, and that is the refusal of the court to grant a new trial.

The real estate in question had been conveyed on the 4th day of March, 1857, by Henry L. Ellsworth, to the appellees, the plaintiffs, as husband and wife. The defendant claimed, mediately, under a sheriff's deed in a sale of the lands on execution against Robert Martin, the husband, at the suit of one Silvers, who purchased at the sheriff's sale, and conveyed to one Simonson, who, before this action was commenced, conveyed to the defendant. The contract on which the judgment was rendered in favor of Silvers against Robert Martin was made January 1st, 1855. The judgment was rendered on the 1st day of February, 1858. The execution issued on the 10th day of June, 1858. The sheriff's sale was made on a writ of *venditioni exponas*, on the 4th day of June, 1859. The sheriff's deed bears date June 22d, 1859.

It is conceded that as the title to the land was conveyed by Ellsworth to Martin and wife, the land could not legally have been sold on an execution against Martin, the husband. But it was claimed at the trial that the title to the land was conveyed to Martin and wife to defraud the creditors of Martin, and that, for that reason, the deed from Ellsworth to Martin and wife was void as to Silvers, and the land, therefore, liable to be sold on his execution.

On the trial, Martha A. Martin, the wife, was allowed,

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McConnell v. Martin *et ux.*

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over the objection of the defendant, to testify as a witness for the plaintiffs, and, in like manner, Robert Martin, the husband, was also allowed to testify for the plaintiffs, the testimony of each tending to repel the charge of fraud in the deed vesting in them the title to the land. The objection to such testimony, on the trial, and that which is now urged, is, that the wife, when testifying, must necessarily give evidence for the husband, and in like manner, the husband, when giving evidence, must necessarily testify for the wife, they being seized of the estate by entireties. *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Falls v. Hawthorn*, 30 Ind. 444; *Simpson v. Pearson*, 31 Ind. 1; *Chandler v. Cheney*, 37 Ind. 391.

Counsel for appellant urge that, although the statute, 3 Ind. Statutes, 559, section 1, authorizes any party in a civil action to testify in his own behalf, yet it is also provided by the same law, sec. 2, that husband and wife, as to matters for or against each other, shall not in any case be competent witnesses. These conflicting statutes, it is claimed, neutralize each other, and leave the question as it was at common law, and that the wife is thereby incompetent to testify in such case.

That husband and wife cannot be witnesses for or against each other, is a rule of the common law. It has been enacted into a statute in this State. Parties could not testify in their own behalf at common law. This rule is abrogated in this State, and it is provided by statute that every person of competent age may be a witness in any civil or criminal cause, or proceeding, and no person is disqualified as a witness by reason of interest in the event of that or any other action, or because such person is a party in said action or proceeding other than criminal. Section 1 above. Later, by the act of March 10th, 1873, Acts 1873, 227, the defendant in a criminal action is allowed to testify in his own behalf. There has been an evident tendency lately in our legislation to open the door to evidence from sources to which the courts could not heretofore look for any light in

the investigation of questions of fact. It is in consequence of this tendency that parties to actions, civil and criminal, have been authorized to testify in their own behalf. The question before us is a very embarrassing one, and it is not the first time that the court has found great difficulty in settling questions arising under the statutes to which we have referred. Substantially, we think, the question here involved was decided by the court in *Bennifield v. Hypres*, 38 Ind. 498, and *Rogers v. Rogers*, 46 Ind. 1. The last named case seems much in point, as there the husband and wife jointly owned one of the tracts of land in question. We hold, then, that the court committed no error in admitting the testimony of the parties in their own behalf, although thereby the rights of the other party might be incidentally affected.

The next question is as to the admissibility of certain evidence of Robert Martin, relating to the state and amount of his property at the time the deed from Ellsworth was made to him and his wife.

There was evidence tending to show that part of the price of the land was paid with means derived by the wife from her father's estate, and the residue, three hundred dollars, was paid by the husband. He testified, over the objection of the defendant, that, at the time of the purchase, he had personal property to the amount of eighteen hundred or two thousand dollars, and more than enough to pay all his debts.

The question whether the purchase of the land in the name of the husband and wife, from Ellsworth, was fraudulent or not, was a question of fact, and we think the amount and value of the property of the husband at that time was a circumstance proper to go to the jury, to enable them correctly to decide that question.

Objection is made to the following instruction, given by the court to the jury:

"Now, gentlemen, if you find from the evidence that the consideration was paid by said Robert, and at the time of said conveyance he, said Robert, was indebted to said Silvers,

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McConnell v. Martin *et ux.*

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and that he had not sufficient other property, at the time of the levying of said execution, to pay said debt, then the title of said Martha Ann, as to the said debt, is presumed to be fraudulent and void, and you should find for the defendant, unless such fraud is disproved."

The same objection is urged to this instruction as that made to the evidence of Martin that he had other property at the date of the deed.

It is urged that lands fraudulently conveyed are subject to sale on execution, and that the sheriff was not bound to go upon the other property of the execution defendant, but might levy upon the land in the first instance.

We think, however, that the question here is not one concerning the order in which the property shall be sold; but it is whether the land is liable to be sold at all or not. If there was no fraud in vesting the title as it was vested, then the land was not liable to be sold on the execution against the husband. Whether there was fraud or not, depended on the question, among others, as to the amount of property owned by the husband when the deed was made.

The instruction, taken as a whole, was quite strong enough, if not too strong, against the wife, in fixing the date of the levy of the execution, instead of the date of the deed, as the time with reference to which she must show that the husband had property to pay the debt. The deed was made March 4th, 1857. The levy was made the 24th of July, 1858.

Objection is made, in a general way, to other instructions, and we are referred to *Ramsdall v. Craighill*, 9 Ohio, 197, in support of the objection. That case decides that when the husband and wife unite in selling the lands of the wife, and receive the money, it becomes the money of the husband. This may be true in the absence of any controlling circumstances. But in the case under consideration, the evidence tended to show that the interest of the wife in her father's estate was exchanged for land in Wells county, which was to have been conveyed to her; that that land was exchanged

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Ogborn *et ux.* v. Hoffman.

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for a lot in Lafayette, the title to which was to have been vested in her, and that the lot in Lafayette and the three hundred dollars were given for the land in question. The title to the land in Wells county and that to the lot in Lafayette were taken in the name of the husband, but, the wife testified, without her knowledge or consent, and in violation of the agreement. We think it proper that such arrangements should be closely scrutinized, as fraud against creditors may often be thus concealed; but in the absence of fraud we see no reason why they are not valid.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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SNYDER v. MARTIN ET UX.

From the Tippecanoe Circuit Court.

*R. C. & W. B. Gregory* and *W. C. Wilson*, for appellant.

*H. F. Blodgett* and *F. B. Everett*, for appellees.

PETTIT, J.—In all legal respects this case is the same as *McConnell v. Martin*, ante, p. 434; and on the authority of that case the judgment is affirmed, at the costs of the appellant.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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OGBORN ET UX. v. HOFFMAN.

**BILL OF EXCEPTIONS.**—*Time of Filing.*—A bill of exceptions, containing the evidence and the instructions to the jury, was filed in open court at the term at which the trial was had and within two judicial days after a motion for a new trial had been overruled and judgment had been rendered, the record not showing that time was given in which to file a bill of exceptions, except as stated in the bill itself.

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Ogborn *et ux.* v. Hoffman.

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*Held*, that the bill of exceptions was properly in the record.

**INFANT.**—*Ratification of Contract of Infant.*—*Presumption of Knowledge of the Law.*—An instruction to the jury that a person of mature age, in order to ratify a contract made by him during infancy, must know that he is not bound by such contract, is not inconsistent with another instruction that every person of sound mind and mature age is presumed to know the law.

**PAYMENT.**—*Satisfaction of Debt by Payment of Smaller Sum.*—A debtor cannot pay and satisfy his debt by the payment of a sum less than the debt; but if the creditor, in order to avoid a suit on an account, of the result of which he is doubtful, agrees to receive any sum in full satisfaction of the amount claimed to be due on the account, and upon such agreement the debtor pays the sum agreed upon, such agreement and payment will completely discharge the debtor from all liability.

From the Wayne Circuit Court.

*H. C. Fox, J. L. Rupe and S. C. Whitsell*, for appellants.  
*L. Develin and H. C. Burchenal*, for appellee.

**PETTIT, J.**—This suit was brought by the appellee, Jacob V. Hoffman, against Sarah E. Ogborn and Samuel Ogborn, her husband, before a justice of the peace, to recover for goods sold, furnished and delivered to the wife before her marriage with her co-defendant. Judgment was asked against the wife only. There was no answer filed, nor was it necessary that there should be, under our statute, to allow all the defences attempted to be made and all the evidence given in the circuit court. The case was contested before the justice, who rendered judgment for the plaintiff. On appeal, the case was tried by a jury, and, after a thorough and earnest contest, the jury returned a verdict for the plaintiff for the same amount as the judgment of the justice.

A motion for a new trial was overruled, and this ruling is the only assignment of error. It is, however, necessary to dispose of a question raised and urged by the appellee, before considering the questions raised by the motion for a new trial. It is claimed that the bill of exceptions containing the evidence and instructions is not legally in, or a part of, the record. The motion for a new trial was overruled and judgment rendered on Friday, and the bill of exceptions was filed on the following Monday, in open court and during

the same term. The record does not show that time was given in which to file a bill of exceptions, otherwise than as stated in the bill itself; but as the bill was filed at the same term, and in two judicial days after the motion was overruled and the judgment rendered, we hold that it was done in time, and that the bill of exceptions is properly in the record. *Johnson v. Bell*, 10 Ind. 363; *Fletcher v. The State*, 49 Ind. 124.

The evidence is somewhat conflicting on these points or questions: first, as to the amount and value of the goods sold; second, as to the minority of the woman when she bought some of them; third, as to her ratification of the contract after she became of age; fourth, as to a settlement by her paying a less sum than the amount of the account; fifth, whether the articles were necessities for the infant girl, and whether the plaintiff had a right to furnish them.

There is no objection made as to the sufficiency of the evidence. Instructions were given on all the questions raised by the evidence, and the only question urged here for a reversal is the alleged error in giving the 20th, 22d and 23d instructions, which are as follows:

“20. If you believe from the evidence that Sarah E. Ogborn, after she became twenty-one years of age and before marriage, with knowledge that she, on account of infancy, was not liable to plaintiff for any purchases she may have made of him, expressly promised that she would pay for any portion of the articles mentioned in the bill of particulars, such a promise would be a ratification of the previous contract to the amount she promised to pay. If she promised to pay all, it would render her liable for all. If she promised to pay a part, or a certain sum, it would render her liable for such part, or for such certain sum; and if she, after such promise, paid any money to plaintiff, it would go as a credit on the amount for which she made herself liable on the new promise.”

“22. A person cannot pay and satisfy a debt by the payment of a sum less than the debt; but if you believe from

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the evidence that the plaintiff, in order to avoid a suit, of the result of which he was doubtful, agreed to receive any sum in full satisfaction of the amount he claimed to be due on said account, and upon such agreement the defendant paid the sum agreed upon, then such agreement and payment would completely discharge the defendant from all liability."

"23. Every person of sound mind and mature age is presumed to know the law."

The appellants' counsel admits that the 20th instruction is clearly right, and refers to *Fetrow v. Wiseman*, 40 Ind. 148, but claims that the 23d instruction contradicts and is inconsistent with it. We do not think so. The 20th says that an infant, to ratify his contract after he becomes of age, must know that he was not bound by his infantile contract. The 23d instruction says that when he arrives at mature age and is of sound mind, he is presumed to know the law. Both propositions are clearly right, and there is no contradiction in them. The 22d instruction is clearly and manifestly the law.

The judgment is affirmed, at the costs of appellant.

Petition for a rehearing overruled.

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DOWNEY v. DILLON.

SLANDER. — LIBEL. — *Perjury*. — *Pleading*. — A charge of perjury, to be actionable, need not set forth the particulars of the supposed crime with the certainty required in an indictment for that offence.

SAME. — *Pleading*. — A charge of false swearing in testimony given on a trial before a competent tribunal—as a circuit court—is actionable, and the materiality of the testimony will be presumed, and need not be averred in a complaint for libel or slander.

SAME. — *Answer*. — *Practice*. — An answer to a complaint for libel, based on a charge of perjury, which contains no defence except a denial of malice, may be struck out where an answer of general denial is filed.

SAME. — *Justification*. — *Practice*. — An answer in justification of a libel imput-

52	442
146	685
52	442
153	431

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ing perjury, which relies upon the truth of the words published, but does not aver that the words were true in the sense imputed to them in the complaint, is bad.

**SAME.**—An answer in justification of an alleged slander charging perjury in testimony given on a trial, which sets out, as material, testimony given by the plaintiff on such trial, and alleges it to have been false, but does not allege that it was known to the witness to be false, or that it was wilfully and corruptly given, is bad on demurrer; such answer must allege facts sufficient to constitute the crime of perjury.

**SAME.**—*Evidence.*—On the trial of an action of libel based on a charge imputing perjury, evidence that the defendant had always before the publication directed his son to treat the plaintiff kindly is inadmissible, as not being confined to a period near the publication. It is incompetent, on such trial, to prove that the testimony on the trial wherein the perjury is alleged to have been committed was commented on by the jury in that case.

**SAME.**—*Evidence of General Character.*—In an action of slander or libel based on a charge imputing a crime, where there is an answer of justification with evidence on the trial to sustain it, the plaintiff may prove his general character in rebuttal.

From the Wabash Circuit Court.

*C. Cowgill, M. H. Kidd and C. E. Cowgill, for appellant.*

*J. D. Conner, for appellee.*

**WORDEN, J.**—This was an action by the appellee against the appellant. The complaint was in two paragraphs, the first counting upon a libel, and the second upon a verbal slander. Demurrer to each paragraph for want of sufficient facts overruled, and exception. Answer, issue, trial by jury, verdict and judgment for the plaintiff.

The errors assigned are:

1 and 2. The overruling of the demurrers to each paragraph of the complaint.

3 and 4. The striking out of the second and ninth paragraphs of the answer.

5 and 6. The sustaining of demurrers to the sixth and eighth paragraphs of the answer.

7. The overruling of the appellant's motion for a new trial.

The first paragraph of the complaint alleges, in substance, that before the publication of the libel therein mentioned, an

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action then pending in the Wabash Circuit Court, in the State of Indiana, wherein the State of Indiana was plaintiff, and one Benjamin Sharpe was defendant, came on for trial, and was tried therein; on the trial of which cause, the plaintiff was sworn and testified as a witness; and that afterwards, on, etc., the defendant printed and published of and concerning the plaintiff and the trial of said cause, and of the plaintiff's testimony upon said trial, the following libelous handbill, viz.:

"Notice is hereby given to the citizens of Liberty township, Wabash county, Indiana, that Harrison Sharpe, John M. Logan, Pete Sailors, and William Dillon did state under oath things that were not true, in the Wabash court, on the 29th day of May, '73, to the effect that the smoke-house of Harrison Sharpe cannot be seen from my house. All persons wanting to satisfy themselves can come and see. I want the people of the Baptist Church to investigate the matter; if not, some other course will be pursued.

"S. DOWNEY."

The second paragraph alleges the trial of the cause in the Wabash Circuit Court, and that the plaintiff was sworn and testified therein as a witness, as in the first paragraph, and that the defendant, afterwards, on, etc., uttered and published of and concerning the trial of said cause, and of and concerning the plaintiff and his testimony upon the trial of said cause, the following words, stated with the proper innuendoes, viz.:

"They swore to a lie." "They swore to a lie, and I intend to publish them." "They all swore to a lie." "They all swore to a damned lie." "They all swore to lies."

Each paragraph contained the usual allegations in respect to the innocence and good character of the plaintiff, the falsity of the charges, the malice of the defendant, etc., and that the defendant meant by the words to impute to the plaintiff the crime of perjury.

It is objected that both paragraphs are bad, because they do not contain a charge of perjury. It is said in the brief

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of counsel for the appellant, that "this publication conveys no idea of corruption or knowledge of the untruth when the statement was made."

A charge of perjury, in order to be actionable, need not set forth the particulars of the supposed crime with the certainty required in an indictment for that offence. Thus, words making a general charge of "perjury" are actionable in themselves without any colloquium. 1 Am. Lead. Cas., top page 108, and notes.

To charge one with being forsworn, or with having taken a false oath, unless connected by some necessary reference to other circumstances constituting the offence, does not, to common apprehension, produce the conclusion that perjury has been committed. Here, however, the imputed false swearing, as charged in both paragraphs, is alleged to have had reference to the evidence of the plaintiff on the trial of the cause in the Wabash Circuit Court. In such case the charges contained in both paragraphs are clearly actionable. In the volume above quoted, at the same page, it is said, that "the question, therefore, whether a charge of false swearing is or is not actionable, depends upon whether it appears from the words themselves, or from the circumstances connected with them, and averred in the introductory matter, that the charge related to an oath in some judicial proceeding, or necessarily conveyed to the mind of the hearer an imputation of perjury; and all the cases go upon this distinction." See, also, *Coombs v. Rose*, 8 Blackf. 155.

It is also urged that both paragraphs are bad because they do not show that the evidence of the plaintiff on the trial of the cause in the Wabash Circuit Court went to a point material to the issue in that cause. There is no force in this objection. In *Wilson v. Harding*, 2 Blackf. 241, it was held, that "where there has been a trial before a competent tribunal, it will be presumed that the testimony given on that trial was material. To charge a man with perjury, in reference to a trial where perjury might be committed, is actionable; as to say, you were forsworn at such a trial; or, as in

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this case, to say of another, that he is forsworn before a justice of the peace, has been held to be actionable."

This case was approved and followed in *Whitsel v. Lennen*, 13 Ind. 535, and *Dorsett v. Adams*, 50 Ind. 129. See, also, 1 Am. L. Cas., 5th ed., top page, 111.

There was no error in overruling the demurrer to each paragraph of the complaint.

The defendant answered in nine paragraphs. The first was a general denial of the first paragraph of the complaint. The second was addressed to the first paragraph of the complaint, and states a portion of the evidence given upon the trial of the cause in the Wabash Circuit Court, showing its contradictory character; states the circumstances under which, and the purposes for which, the publication was made, and denies all malice in the publication. No error was committed in striking out this paragraph. It constituted no defence except so far as it denied the malice, and this was covered by the general denial.

The ninth paragraph of the answer was somewhat, though not altogether, like the second. It was addressed to the first paragraph of the complaint, and set out evidence alleged to have been given on the trial of the cause in the Wabash Circuit Court. The paragraph is long and need not be set out in full, but we copy the concluding portions:

"And the defendant avers that after said trial it became and was matter of common talk and notoriety in the neighborhood where the plaintiff and defendant at the time resided, that the evidence above stated as given by the plaintiff and others, and by the defendant and his said grandson, on said trial, was contradictory, conflicting and irreconcilable, and that the said witnesses for the State, or the said witnesses for the defendant Sharpe had been mistaken. Defendant says that, for the purpose of protecting his own character and that of said daughter and grandson from unjust suspicions and aspersions by reason of said contradictory evidence, he published the words complained of by the plaintiff, and avers that the same are true, and were published under

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the circumstances above set forth, and for the purpose herein alleged, and for no other purpose; wherefore he justifies the publishing of the same, and demands judgment."

This paragraph was clearly not good as a justification. Although it avers that the words were true, it does not aver that they were true in the sense imputed to them. "A justification on the ground of truth must justify in the sense imputed by the innuendo, for the reason that the plea admits the innuendo." Townshend on Slander & Libel, 2d ed., sec. 215. We have seen that, by the allegations of the complaint, the defendant published the words, meaning and intending thereby to impute to the plaintiff the crime of perjury. The words published, in reference to the plaintiff's testimony upon the trial of the cause mentioned, are clearly susceptible of that meaning. In order to a justification, the answer should allege facts sufficient to show that the plaintiff did commit perjury upon that trial. The court below thought the substance of this paragraph embraced by the general denial, and therefore struck it out. If the paragraph contains any ground of defence, it is perhaps an argumentative denial that by the words, the defendant intended to impute to the plaintiff the crime of perjury, and a like denial of the malice. But these were covered by the general denial, and the court committed no error in striking the paragraph out.

The sixth paragraph of the answer, to which a demurrer was sustained, was pleaded to the second paragraph of the complaint, and was intended as a justification. It alleges, that upon the trial of the cause in the Wabash Circuit Court, certain matters material to the issue in that cause were testified to by the plaintiff, setting them out, but it does not allege that the plaintiff corruptly or knowingly made the statements, nor does it allege that he knew them to be false. The only allegation in that respect is the following: "Which evidence so given by plaintiff was false and known at the time to be false." It is not charged, as will be seen, that the evidence was known by the plaintiff to be false. This

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paragraph does not state facts sufficient to constitute perjury. It does not show that the plaintiff's testimony was wilful or corrupt. See authority last cited, sec. 214. There was no error in sustaining the demurrer to this paragraph.

The eighth paragraph of the answer was pleaded to the second paragraph of the complaint, and by it the defendant says, "he admits that at the April term, 1873, of the Wabash Circuit Court, a cause was tried therein, in which the State of Indiana was plaintiff, and one Benjamin Sharpe was defendant; and he alleges that during the progress of said trial it became and was material to know the general character of Mary E. Downey, a daughter of this defendant, and who had been called and duly sworn as a witness, and testified therein; and thereupon the plaintiff herein was called and duly sworn as a witness in said cause, and testified therein, and, among other things, testified that one John Logan had told plaintiff said Mary's character was bad, and that said witness had heard John Logan say said Mary's character was not good, all of which testimony was false, and known to be false by said plaintiff at the time it was so given; wherefore the defendant says plaintiff, in giving said testimony, was guilty of wilful and corrupt perjury, and the defendant justifies the speaking of the words complained of."

A demurrer to this paragraph, for want of sufficient facts, was sustained, and the defendant excepted.

To constitute the crime of perjury, the false swearing must be wilful and corrupt. 2 G. & H. 450, sec. 40. The answer in question does not aver that the plaintiff wilfully or corruptly swore as is imputed to him. The statutory words, "wilfully and corruptly," seem to constitute an essential element in the description of the offence. It is sufficiently averred that the testimony was false, and that the plaintiff knew it, but this does not come up to the statutory description of the crime.

In *Rex v. Richards*, 7 D. & R. 665, it was said by ABBOTT, C. J.:

"Now according to every definition, the offence of per-

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jury consists in swearing to some matter which is untrue, 'wilfully and corruptly.'" And judgment, on a verdict of guilty, was arrested for the want of them.

Bishop says: "That perjury must be what the law calls wilful and corrupt, is well settled." 2 Bishop Crim. Law, sec. 1046. See the case of *Thomas v. The Commonwealth*, 2 Rob. Va. 795, where an indictment was held bad for the want of the words "wilfully and corruptly."

In *United States v. Babcock*, 4 McLean, 113-117, the court, in speaking of an indictment for perjury, said: "But the averments must show that the defendant knew that he swore falsely, and that his motive was corrupt."

It is clear that the matter alleged in the answer would not, if contained in an indictment, constitute a valid charge of perjury, for the want of an allegation that the plaintiff wilfully and corruptly swore as therein stated.

In 1 Am. Lead. Cas., 5th ed., top page 189, it is said: "Where some crime is charged in the slander or libel, and there is a justification of the truth of it, the plea must contain the same degree of certainty and precision as are required in an indictment for the crime; and must be supported by the same proof that is required on an indictment for the crime. Thus, in regard to a charge of perjury, a justification must show that the false swearing was in a judicial proceeding, where a lawful oath had been administered, and in a material point, and was absolute and wilful."

So in Townshend on Slander, etc., at sec. 214, it is said: "To justify a charge of perjury on the ground of truth, it must not only be alleged that the plaintiff's testimony was false, but that it was wilful or corrupt."

Tested by these rules, the paragraph was bad, and the court committed no error in sustaining the demurrer. That portion of the paragraph following the "wherefore" adds nothing to what had been previously alleged. It is the conclusion which the pleader drew from the facts already stated, and does not supply the omission of any material allegation.

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It may be observed, before passing from this paragraph, that its sufficiency in another respect is questionable. There does not appear to have been any connection between the matter alleged to have been material, and the matter alleged to have been sworn to by the plaintiff. It is alleged to have been material to know the general character of Mary E. Downey. The plaintiff is not charged with having testified at all in relation to the general character of the person named. He testified only, so far as is alleged, as to what John Logan said about the character of the person named; yet it is not alleged that what John Logan said was material. If the plaintiff was called upon to testify as to the general character of Mary E. Downey, and thereupon testified in chief that such character was bad, and if, upon cross-examination, upon being interrogated as to what he had heard said on the subject, and by whom, he had testified as is charged, it would seem that the facts should have been alleged, so as to have shown the relation which his testimony bore to the matter alleged to have been material.

We come to the seventh and last assignment of error, the overruling of the motion for a new trial.

The first and second reasons for a new trial go to the evidence, in which there is nothing that requires us to interfere with the verdict of the jury.

The third and fourth have reference to the rulings of the court on the pleadings, and are not insisted upon as grounds for a new trial.

The fifth reason was based upon the ruling of the court in excluding the following evidence: Jacob Downey, a son of the defendant, was being examined as a witness, and the record shows that it was "proposed by the defendant's attorney to prove by this witness that his father had always before this publication directed him and his other children to treat Mr. Dillon kindly." This evidence was rejected. The record does not show that the defendant stated to the court the object of the proposed evidence, or the ground on

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which it was supposed to have been admissible, nor does it show on what ground it was rejected.

It is urged by the appellant that this evidence was competent as showing a good state of feeling on the part of the defendant toward the plaintiff, in order to rebut any evidence or inference of malice. But conceding, without deciding, that evidence of such friendly feeling would be competent for such purpose, still it ought to be confined to a period near the publication. The case is analogous to that of *Porter v. Henderson*, 11 Mich. 20, where, in an action for slander, the court below "refused to allow evidence that during the six years prior to the trial, inveterate feelings of hostility had existed between the plaintiff and defendant, and that the plaintiff had taken every opportunity to irritate the defendant."

The court said, in relation to the evidence thus rejected:

"There must be either some misconduct or some provocation immediately occasioning the grievance, or so connected with it as to furnish to some degree a reason or excuse for it, to allow the act of the defendant" (in error) "to mitigate the damages the law would otherwise award for the injury. The proposition in this case was too broad, as it tended to show no immediate provocation, or proper motive; but, on the contrary, malice and inveterate hostility on the part of the defendant, as well as on that of the plaintiff, for years prior to the alleged injury."

So here, the evidence offered was too broad; it proposed to show the feelings of the defendant toward the plaintiff, "always before this publication." The evidence, as offered, was objectionable for this reason, if for no other, and the court committed no error in excluding it.

We are referred by the counsel for the appellant, in their brief, to the following passage in the bill of exceptions. as the basis for the sixth reason for a new trial, viz.:

"Re-examination of Campbell. Proposed by defence to ask, as an original question, that" (whether the) "conflict of

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testimony between State's and defendant's witnesses in the Benjamin Sharpe trial was commented upon by the jury in their deliberations upon that case. Objected to as incompetent testimony. Sustained. Exception."

The evidence was so clearly incompetent that we shall consume no further time in its consideration.

The appellant makes no point upon the seventh and ninth reasons. The eighth alone remains to be considered. It is "error of the court in allowing the plaintiff, over the defendant's objection, to offer proof in support of his general character for truth and veracity, when the defendant had offered no evidence attacking or impeaching his general character for truth and veracity."

The defendant had put in an answer of justification and had given evidence tending to sustain it. Greenleaf says:

"Wherever the truth of a charge of crime is pleaded in justification, the plaintiff may give his own character in evidence to rebut the charge." 2 Greenl. Ev. sec. 426. We think that where the truth of a charge of crime is pleaded in justification, and evidence is given tending to sustain the plea, as in this case, the plaintiff may give in evidence his general character, in the same manner as if he were on trial upon an indictment for the alleged crime. *Harding v. Brooks*, 5 Pick. 244. This was held to be the law in the case of *Byrket v. Monohon*, 7 Blackf. 83, where the court said:

"The defendant undertook to prove that the plaintiff had committed perjury; and the jury, in making up their minds on the subject, had surely a right to take into consideration, if the defence was not clearly proved, the general good character of the plaintiff for truth. Indeed, it would seem that such evidence ought never to be withdrawn from the jury, though it will often be rendered of no avail by the nature of the defendant's evidence. If the plaintiff were indicted for the offence, it would be proper for the jury, in making up their verdict, to take into consideration his general good

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character for truth; \* \* \* and the law must be the same in the case before us."

See, also, as bearing upon this question, the following cases:

*Adams v. Lawson*, 17 Grat. 250; *Shroyer v. Miller*, 3 W. Va. 158; *Scott v. Peebles*, 2 Sm. & M. 546; and *Romayne v. Duane*, 3 Wash. C. C. 246.

In *Miles v. Vanhorn*, 17 Ind. 245, an action for slander brought by a woman, for words impeaching her chastity, where the defendant had justified and offered evidence in support of his justification, but had given no evidence touching the general character of the plaintiff, it was held that she could not give evidence in support of her general character. The case is not in conflict with that cited from 7 Blackf., or with the principle above announced.

The case of *Miles v. Vanhorn* did not involve the charge of a crime.

This court, in the case of *Wilson v. Barnett*, 45 Ind. 163, recognized the distinction between slander involving a charge of crime, and that impugning the chastity of a woman, which latter is made actionable by statute; holding that, while in the former case a justification must be proved beyond any reasonable doubt, in the latter case it need only be proved, like other civil matter, by a preponderance of evidence.

In *Haun v. Wilson*, 28 Ind. 296, the court clearly recognized the principle announced above. The action was for slander in charging the plaintiff with larceny. The court said:

"After the evidence on the part of the defence was closed, the plaintiff offered to read in evidence the depositions of several witnesses, taken and filed by him, for the purpose of sustaining his general good character, but the defendant objected, and the court sustained the objection. This ruling is also complained of. The plaintiff's character was not put in issue either by the pleadings or the evidence. There was no answer alleging the truth of the charge in justification,

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and no evidence was offered or given to the jury impeaching the plaintiff's character. The evidence offered was improper, and the court did right in rejecting it."

There was no error in admitting the evidence.

We have thus gone through with this lengthy case, and find no error in the record.

The judgment below is affirmed, with costs.

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## AMSDEN v. THE STATE.

From the Henry Circuit Court.

*D. W. Chambers* and *E. Saint*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

WORDEN, J.—Information against the appellant for selling intoxicating liquor to James H. Bock, the latter being a minor. Trial and conviction.

The case is before us on the evidence. There is no evidence in the record that Bock was a minor. This element in the case should have been, but was not, proved. A motion which was made for a new trial should have prevailed.

The judgment below is reversed, and the cause remanded for a new trial.

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## WARD v. THE STATE.

SUPREME COURT.—*Evidence.*—*Instructions to Jury.*—Where, on appeal to the Supreme Court in a criminal action, it does not appear by bill of exceptions that all the evidence is in the record, the question as to whether the verdict is contrary to the evidence cannot be considered; and the judgment cannot be reversed on instructions given to the jury which might have been right under evidence that might have been legally and properly given on the trial.

From the Decatur Circuit Court.

*J. S. Scobey* and *B. W. Wilson*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

PETIT, J.—The appellant was indicted for an assault and battery with intent to murder one Callicut. Trial, conviction, fine of fifty dollars, and imprisonment for thirty days. Motion for a new trial overruled, and judgment on the verdict.

The only error assigned is the overruling of the motion for a new trial, the reasons for which were these :

1. The finding of the jury is contrary to the evidence and not supported by sufficient evidence.

2. The finding of the jury is contrary to the law and contrary to the charge given by the court to the jury.

3. The court erred in giving a certain charge to the jury, which is set out; but no exception was taken to it, hence we cannot consider it.

4. The court erred in giving to the jury the following instruction :

“If the jury believe from the evidence that defendant and prosecuting witness, without any particular premeditation, or intention of fighting on the night in question, commenced quarrelling, passed the lie from one to the other, and that Callicut struck the first blow, defendant had the right to protect himself by any proper means; but the use of a sharp knife, striking a blow with it at a vital part of the body of prosecuting witness, and by which he inflicted a dangerous wound upon him, is not that measure or manner of self-defence which the law allows, and the defendant by the use of such weapon, in such manner, would become the aggressor; and the jury may find him guilty of a simple assault and battery, and affix the utmost penalty of the statute for such offences against him, which is a fine of not more than one thousand dollars, to which they may add imprisonment in the county jail for not more than six months, or a penalty as much less than this as they may deem proper. See statute, page four hundred and fifty-nine, section seven.”

This instruction was excepted to.

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5. The court erred in giving the following instruction to the jury, which was excepted to:

“If you find the want of premeditated or unpremeditated malice, but that defendant, by the use of an unlawful weapon, became himself the aggressor, your verdict will be, ‘We, the jury, find the defendant guilty of an assault and battery, and assess his fine at —— dollars’ (not more than one thousand dollars), to which you may add imprisonment in the county jail for any determinate period of not more than six months.”

6. The court erred in charging the jury as follows, which was excepted to, as is shown by the bill of exceptions:

“The prosecution has introduced threats made by defendant against Callicut before the encounter described in the indictment, and the defendant has introduced evidence of fear and a disposition to avoid a meeting with Callicut. These matters tend to prove or disprove malice, and go to the question of intent, and can only be considered in determining the question of murder, the higher grade of the offence. Upon the question as to whether defendant committed a simple assault and battery, the subject of malice does not form an essential element. You will first determine whether he is guilty of the higher offence. If you come to the conclusion that he is not guilty of an assault and battery with the intent to commit murder, you will next consider whether the evidence will justify you in finding him guilty of a simple assault and battery. If, from this evidence, you shall find defendant guilty of the higher grade of the offence, and also that he was under twenty-one years of age at the time of the commission of the offence, in lieu of imprisonment in the penitentiary, the statute provides that you may substitute imprisonment in the county jail for any determinate period. (Page four hundred and fifty-four.) If the jury believe from the evidence that this affray originated from a sudden heat, begotten at the time, and without premeditation, the necessary ingredient to con-

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stitute the higher offence, *malice*, is wanting, but yet defendant may be guilty of a simple assault and battery."

The bill of exceptions does not show that all of the evidence is before us in the record, by words, nor are there any equivalent words from which we can draw the conclusion that it is. We cannot, therefore, consider any question as to the evidence; nor can we reverse the judgment on the instructions, if they may have been right under a state of the evidence that might have been legally and properly given in the case. Without eliminating, recopying or commenting on the instructions given and excepted to, we think a state of evidence might have legally existed that justified giving them.

The judgment is affirmed, at the costs of the appellant.

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BOND v. THE STATE.

**CRIMINAL LAW.**—*Permitting Minor to Play a Game.*—*Evidence.*—On the trial of an indictment under the act of March 8th, 1873 (Acts 1873, p. 30), for unlawfully permitting a minor to play a game of billiards with another person, upon a table of which the defendant had the control, it is not necessary to a conviction that it should be proved that anything was wagered on the game which was played.

**SAME.**—*Oath of Grand Jury.*—The form of the oath to be administered to the grand jury, found on page 387, 2 G. & H., has been superseded by that provided in the act of December 31st, 1865, 3 Ind. Stat. 279.

**SAME.**—*Arrest of Judgment.*—It is not a cause for arrest of judgment in a criminal action, that the grand jury was not sworn according to the statutory form.

From the Jackson Circuit Court.

*D. H. Long* and *B. E. Long*, for appellant.

*C. A. Buskirk*, Attorney General, *S. B. Voyles*, Prosecuting Attorney, and *R. D. Doyle*, for the State.

**DOWNEY, C. J.**—This was an indictment against the appellant, under the act of March 8th, 1873 (Acts 1873, p.

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30), for unlawfully permitting a minor to play a game of billiards with another person named, upon a billiard table, of which he, the defendant, then and there had the control. Plea, *non oul.* Trial by the court, without a jury. Finding, that the defendant was guilty. Motions for a new trial and in arrest of judgment overruled, and final judgment.

Errors assigned :

1. Overruling the motion for a new trial.
2. Refusing to arrest the judgment.

Under the first assignment of error, it is urged that the evidence was not such as to justify the finding of the court. It is not controverted that the evidence on the part of the State shows the defendant's guilt, but it is urged that the testimony of the defendant in his own behalf disclosed such new or additional circumstances as required his acquittal. We cannot know that the defendant's testimony was regarded by the court as credible. This was, as we all know, a matter within the province of the court trying the cause.

Again, it is urged that it does not appear that anything was wagered on the game which was played. We do not think that this was necessary. The object of the legislature was to discourage the playing by minors at the games mentioned in the act, whether anything was lost and won or not. This is made evident by the second section of the act, which makes it penal to allow minors to congregate at and about the places where such tables are kept, without reference to the question whether any game is played thereon or not.

Under the second assignment of error, it is urged that the judgment should have been arrested because the grand jury was not sworn, as appears from the clerk's entry, according to the statutory form at p. 387, 2 G. & H., but was sworn "diligently to inquire into, and true presentment make of all violations of the criminal law of the State of Indiana, of which this court has jurisdiction," etc.

The form of oath referred to by counsel has been superseded by a later act, which the clerk appears to have fol-

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lowed in the oath administered. Acts 1865, p. 155, found in 3 Ind. Stat. 279. But the objection made, if otherwise well founded, is no ground for arresting the judgment. 2 G. & H. 424, sec. 144.

The judgment is affirmed, with costs.

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LAYDON v. THE STATE.

**CRIMINAL LAW.** — *Venue.* — *Evidence.* — On the trial of an indictment for murder, in the Fountain Circuit Court, a witness for the State, who testified to the whole transaction, having been present and having seen it all, concluded his evidence by saying, "This took place" (giving the date) "in Fountain county, Indiana."

*Held*, that the venue was proved.

**SAME.** — *Arrest of Judgment.* — Where the facts stated in an indictment constitute a public offence of which the court has jurisdiction, a motion in arrest of judgment will not lie.

From the Fountain Circuit Court.

*D. W. Voorhees, J. Ristine, G. McWilliams and M. Milford*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

**PETTIT, J.** — Indictment for murder; trial; verdict of manslaughter, eight years' imprisonment, and a fine of one dollar. Motions for a new trial and in arrest of judgment were overruled, and judgment was rendered on the verdict. The motion for a new trial calls in question the sufficiency of the evidence only.

The evidence, after a careful examination, we are satisfied, justified the verdict.

It is objected that the venue was not proved. In this the counsel are mistaken. James Lock, a witness for the State, who testified to the whole transaction, having been present

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and having seen it all, concludes his evidence in these words: "This took place the 11th of August, 1874, in Fountain county, Indiana." No words could more clearly settle or prove the venue than these.

After the preliminary parts, this was the indictment:

"Did then and there, with force and arms, unlawfully, feloniously, purposely and maliciously, make an assault upon one Daniel Driscoll, then and there in the public peace being; and did then and there, with force and arms, and with a certain knife, which the said Timothy Laydon then and there had and held in his hands, him, the said Daniel Driscoll, then and there, unlawfully, feloniously, purposely and maliciously touch, strike, cut, thrust, bruise and wound, then and there and thereby giving the said Daniel Driscoll, in and upon the left side, near the heart of him, the said Daniel Driscoll, three mortal wounds, each of the width of one inch, and each of the depth of three inches, of which mortal wounds the said Daniel Driscoll did then and there instantly die. And so the grand jurors aforesaid, on their oaths aforesaid, do say that the said Timothy Laydon the said Daniel Driscoll, then and there, in manner and form aforesaid, unlawfully, feloniously, purposely and maliciously did kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

This indictment, we hold, was clearly good.

In a criminal case, a motion in arrest of the judgment only raises two questions:

"1. That the grand jury who found the indictment had no legal authority to inquire into the offence charged, by reason of it not being within the jurisdiction of the court.

"2. That the facts stated do not constitute a public offence." 2 G. & H. 424, sec. 144; *Bishop v. The State*, 50 Ind. 125; *Mullen v. The State*, 50 Ind. 169; *McGuire v. The State*, 50 Ind. 284; *Bond v. The State*, at this term, *ante*, p. 457.

An offence was clearly and properly charged, and the

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court in which it was made had jurisdiction of it. The motion in arrest was properly overruled.

The judgment below is affirmed, at the costs of the appellant.

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BURKE v. THE STATE.

**LIQUOR LAW.—Indictment.**—An indictment under the last clause of section 1 of the liquor law of 1875, Acts Spec. Sess. 1875, p. 55, which did not allege that the defendant sold intoxicating liquor to be drank in any of the places named in said section, or that he had no license to sell such liquor to be drank in said places, but alleged that he had no license to sell such liquor to be drank “on the premises,” was bad on motion to quash.

From the Henry Circuit Court.

*Chambers & Saint*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

**PETTIT, J.**—Indictment for selling liquor in violation of the last clause of section 1 of the act of March 17th, 1875, to regulate and license the sale of spiritous liquors, etc., Acts of Special Session of 1875, p. 55, which reads thus:

“Nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drank, or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging.”

The indictment does not allege that the defendant had no license to sell liquor to be drank in the places named in the statute, nor that the liquor was sold to be drank in any of the places named in the statute, but it says:

“The said Burke not then and there having a license to sell intoxicating liquor to be drank on the premises;” not his premises or the premises where the liquor was sold, or any of the places named in the law. The indictment does

not make a case under the law, and the motion to quash should have been sustained.

The judgment is reversed, with instructions to sustain the motion to quash the indictment.

### BAILEY v. THE STATE.

CRIMINAL LAW.—*Larceny.—Possession of Stolen Goods.*—The possession, by one not the owner, of personal property alleged to have been stolen, does not raise a presumption that such possessor is guilty of larceny, unless a previous larceny of the property has been established by proper evidence. If the larceny has been so established, and the exclusive possession of the property by one not the owner soon after the larceny has been proved, such possession, if not explained by direct evidence, or by attending circumstances, or by the character and habits of life of the possessor, or otherwise, is conclusive of his guilt as the thief.

SAME.—*Appropriating Lost Property.*—If personal property be lost by the owner and found by another person, and by the latter be taken and appropriated to his own use, the finder knowing the owner, he is guilty of larceny; but if he do not know, and have not the means of ascertaining, who is the owner, he is not guilty of larceny, even though he may not have advertised the property, and however reprehensible his conduct may be afterwards, in attempting to appropriate it to his own use.

From the Vanderburgh Circuit Court.

*A. Iglehart and J. E. Iglehart*, for appellant.

*C. A. Buskirk*, Attorney General, and *J. B. Rucker*, Prosecuting Attorney, for the State.

BIDDLE, J.—Indictment against the appellant, charging him with stealing a pair of shoes, of the property of Charles I. Moffett. Plea, not guilty; trial by jury; verdict, guilty, fine one dollar, imprisonment in the State's prison one year, disfranchisement one year. Motion for new trial overruled; appeal.

The insufficiency of the evidence to support the verdict, and errors of law in giving and refusing instructions to the jury, are the main points urged on behalf of the appellant.

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130	207
52	462
148	187
148	524

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The property, description, value, venue, etc., seem to be sufficiently established, but it is most earnestly contended that the body of the crime, the larceny, has not been proved. Upon this point, Charles I. Moffett testified:

“My name is Charles I. Moffett. I live in Center township, Vanderburgh county, seven and a half miles from Evansville. On July 15th, 1876, I came to Evansville, and bought a pair of shoes from James S. Ricker, of the firm of H. & J. S. Ricker, Main street, Evansville, between Second and Third streets, for one dollar and fifty cents, and paid for them. They are the same shoes as those exhibited in court now. I know them by the mark put in them by George Newett, policeman. After buying the shoes, I left them at Ricker’s for two or three hours. While they were there, I went out and took too much beer. I next saw the shoes next day, last Sunday, at police headquarters. I think I took the shoes from Ricker’s to Kasson’s saloon with me, but I can’t swear it positively. I think I saw defendant at Kasson’s saloon; can’t swear positively; can’t tell where I parted with the possession of the shoes; can’t swear positively that I had the shoes at Kasson’s saloon. It all occurred at Vanderburgh county, Indiana. I recognized the shoes, after they were left at police headquarters, by the way the laces were tied.”

Cross-examined. “The shoes, when bought, were taken out of a box with other shoes similar in it. I recognized the shoes afterwards by the way Mr. Ricker tied the knot of the leather laces. These shoes exhibited in court could not have been the shoes, unless the manner of tying them had been imitated purposely. Two pairs were not likely to have been alike. I do not know what became of the shoes; was under the influence of beer.”

Henry Ayres testified:

“Am chief of police in Evansville. I saw the defendant first last Saturday evening. One Muscowitz, second-hand dealer on Fourth street, came to me, and I went with him. The defendant was trying to sell him the shoes exhibited

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here in court, the shoes pointed out by Charles Moffett, for one dollar. Muscowitz offered him fifty cents. I arrested the defendant, and asked him where he bought the shoes. He said, at a store on Main street. I went with him, and he pointed out as the place H. & J. S. Ricker's store. He said he bought them yesterday (Friday), then corrected himself and said Thursday. The wrapper was off, and the laces were not in the shoes then. They were left at Muscowitz's. I went up there after them, and they were brought down to Ricker's. Defendant was uncertain who he bought the shoes from, but afterwards pointed out Ludwig, who denied selling them. Mr. Ricker said, as he had shoes of that kind in the store, he might have bought them there, and did not feel like prosecuting the defendant, he not having missed the shoes. I then hunted up defendant the second time. Moffett was not along. Defendant said he sold the shoes on Water street. He took me to Speer's, on Water street, and showed me his place. He sold them for one dollar. I took them; he paid back Speer ninety cents, all the change he had. I locked him up. When I first saw the shoes, the strings were not tied as they are now. Defendant told me promptly where the shoes were, and claimed them as his shoes. He was at first uncertain who he bought them of, but afterwards pointed out Ludwig. He claimed the goods as his own and took me to Speer's."

Charles Ludwig testified:

"I am clerk for H. & J. S. Ricker. Saw defendant there; Ayres brought him there. Defendant said he bought the shoes of me. I did not remember it. I did not sell them to him. I never saw him before Ayres brought him there. I saw J. S. Ricker sell the shoes exhibited in court, to Moffett. These are the identical shoes. Moffett put some mark in the shoes; I saw him do it. Moffett came back to Ricker's store, two or three hours after he bought the shoes, and took the shoes away with him; I handed them to him. He was intoxicated when he came back and took the shoes."

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Cross-examined. "There were other shoes in same box, similar to these shoes. When Ricker sold them, I stood about twelve feet off. I saw Moffett mark the shoes, when he bought them. I recognize them in that way. I can't swear positively about that. Shoes worth one dollar and seventy-five cents."

B. Speer testified:

"On Water street, Saturday last, at my store, I bought shoes (here in court) from defendant, at one dollar. He told me that the police had arrested him, but said they had told him to go, he might sell them if he wanted to."

Cross-examined. "I tied the laces in the shoes, as they are now. Defendant was open about the matter; the shoes were wrapped in a paper."

Here the State rested, and the defendant produced George Newett, a competent witness, who testified:

"I put the letter M in the shoes, this morning, in pencil. I think I only put three M's in them." Here witness was shown the shoes, and identified the M's he put in. "There are four in them, as shown to me now. Moffett has had the shoes since I marked them."

This was all the evidence given in the case, except some statements made by Moffett, called out by the appellant, which were not substantially different from his testimony, and therefore need not be given in this opinion.

After the introduction of the evidence and the close of the argument, the appellant asked the court to instruct the jury as follows:

1. "If the jury believe from the evidence that Charles I. Moffett, while under the influence of liquor, or otherwise, lost the shoes mentioned in the indictment, then you must acquit the defendant, even though you find that the defendant afterwards had possession of them."

The court refused to give this instruction, as asked, but gave it in a modified form, as follows:

"If the jury believe from the evidence that Charles I.

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Moffett, while under the influence of liquor, or otherwise, lost the shoes mentioned in the indictment, then, under such circumstances that the finder could not identify the owner, you must acquit the defendant, even though you find that the defendant afterwards had possession of them."

We think the court committed no error in refusing the above instruction as asked, nor in giving it as modified, for reasons which will subsequently more fully appear in this opinion.

The second instruction asked by the appellant was in the following words:

2. "If you find from the evidence that no one but said Moffett testified in regard to the taking of said shoes, and if you believe that said Moffett does not know and cannot explain how he parted with their possession, then you must acquit the defendant, even if it appears that he afterwards had possession of them."

The court refused to give this instruction, "but read to the jury, in lieu thereof," from the opinion of this court, in the case of *Smathers v. The State*, 46 Ind. 447, our views upon a similar question, as expressed on page 451. We need not enlarge this opinion by copying within it what we decided in that, to which we still adhere. In this view—and we think it covers the whole case—there was no error in refusing the second instruction, and none in reading from a former opinion of this court.

The record then informs us, that "the court further read to the jury the following, taken from Bicknell's Crim. Practice, p. 331:

"A person may be guilty of larceny by taking and converting to his use lost goods found by him. If he knows the owner, it is clearly larceny; as where a carpenter finds money secreted in a bureau given him to repair, if he convert it to his own use, it will be larceny. So, if a hackman convert to his own use a parcel, left by a passenger in his coach by mistake, it is larceny if he knew the owner, or if he took him up or put him down at any particular

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place where he might have inquired for him. So, where there is a mark upon the property, by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion amounts to larceny. So, where a person bought at auction a bureau, and found in it a secret drawer containing money, which he used, it was held that would be larceny, unless he had reasonable grounds for believing that he bought the bureau and its contents. But where the finder does not know the owner, and has nothing to indicate where the owner may be found, his appropriation of the goods will not be larceny, even although he has not advertised the goods. And the mere fact that he had secreted the goods, or denied finding them, will not make it larceny."

In our opinion, this instruction expresses the law, carefully and clearly stated; and it seems to us, in this case, that the court committed no error, either in giving or refusing instructions to the jury.

A more difficult question for us to decide is, does the evidence fairly sustain the verdict? We must adhere firmly to the principle of law, that the possession of property alleged to have been stolen is not a presumption of guilt against the possessor, unless a previous larceny of the property is established by proof; and the presumption of guilt will not arise until the larceny is proved by some proper evidence. In this case the evidence, aside from the conduct of the appellant, tends only very slightly to prove a larceny of the shoes. The condition of Moffett, the owner of the shoes, was such, at the time, that he might very easily have mislaid, forgotten, or lost them, without remembering anything about them; and the same condition would make it very easy for any one to steal the shoes from him without his knowledge. But the conduct of the appellant, after he had obtained possession of the shoes, is open to very grave suspicions. His inability to readily account for how, when and where he obtained them, the transaction being so recent; his ultimate assertions that he bought them of Ludwig, which Ludwig denies; and his

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fixing the time of the purchase on Thursday, while they remained in the possession of the merchant until Saturday afterwards, before they were sold to Moffett; the fact that the laces were taken out of the shoes, and the sale of them by appellant so soon afterwards, much below their value, are all indices of guilt, and show a line of conduct in reference to the shoes altogether out of the ordinary course of men's affairs in the regular and honest transactions of life; yet all of this may be true, and the appellant innocent of the crime charged against him. If Moffett lost his shoes—a supposition not at all unlikely, considering his condition at the time—and the appellant merely found and took them, not knowing, and not having the means to find out, who owned the shoes, he cannot be guilty of larceny, however reprehensible his conduct might be afterwards, in attempting to appropriate the shoes; and his conduct may be interpreted as meaning nothing more than an attempt to fortify his claim to the shoes he had found, instead of stolen.

We are of the opinion that the conviction is not a safe one under the law.

The judgment is reversed; cause remanded, with instructions to grant the motion for a new trial, and for further proceedings.

Order for a return of the prisoner.

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146	552

### DE CAMP ET AL. v. ALWARD.

**CORPORATION.**—*Assignment of Property for Benefit of Creditors.*—A corporation, unless restrained by its charter or by general law, and therefore a manufacturing corporation of this State, by a majority of its board of directors, without the express authority or consent of its stockholders, may cease to do business and assign its property to a trustee, to be sold, the proceeds to be applied to the payment of the debts of the corporation, and the surplus, if any, to be divided *pro rata* among the stockhold-

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ers. Such action of a corporation will not constitute a surrender of its franchises as a corporation, or work its dissolution.

SAME.—The good faith of the directors in the passage of the resolution to make such an assignment and the necessity or expediency of the assignment are questions for the jury.

INSTRUCTIONS TO JURY.—When a court, in its instructions to a jury, has fully presented the questions involved in the cause on trial, giving them all the information necessary to a full understanding of the law of the case, it is not error to refuse to give other instructions asked by a party, though they be correct.

From the St. Joseph Circuit Court.

*W. H. Calkins*, for appellants.

*L. Hubbard*, for appellee.

DOWNEY, C. J.—The appellee sued Michael De Camp and Alma De Camp, alleging in his complaint the following facts, in substance: that, on the 19th day of May, 1871, Thebus M. Bissell, Michael De Camp and Andrew Anderson organized a corporation, known as the "T. M. Bissell & Co. Manufacturing Company," under the statute of the State then in force, at South Bend, Indiana; that the capital stock of the company was ten thousand dollars, divided into shares of fifty dollars each; that said Anderson subscribed for and holds two shares, T. M. Bissell subscribed for and holds ninety-nine shares, and said De Camp subscribed for ninety-nine shares; that, on the 28th day of July, 1871, Michael De Camp assigned ninety-eight shares of his stock to his wife, the said Alma E. De Camp, and she still owns the same, the said Michael still holding one share. It is further alleged, that said Michael De Camp, Thebus M. Bissell and Andrew Anderson became and still are directors, said De Camp being president, said Bissell treasurer, and said Anderson secretary; that said capital stock has all been paid in; that said company did business until the 29th day of April, 1873; that said T. M. Bissell had made large advancements to the company, in money, for which the company was indebted to him; that dissensions and differences had arisen between said Bissell and De Camp, and said Bissell was unwilling to continue to make or keep up such advancements; that, on

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the 29th day of April, 1873, said company was seized in fee simple of certain real estate, in South Bend, which is particularly described, with twenty-five shares of stock, and the right to use water-power in the South Bend Manufacturing Company, which land and water-power constituted the site for the works of said T. M. Bissell & Co. Manufacturing Company; that all of said land and said stock in the said South Bend Manufacturing Company was conveyed by said Alma E. De Camp and her said husband, May 23d, 1871, for the sum of eight thousand dollars; that on the said 29th day of April, 1873, said T. M. Bissell & Co. Manufacturing Company was also the owner and possessor of a large amount of machinery, tools, goods, wares and merchandise and chattels, which are specially described in a schedule attached to the complaint.

It is then averred, that, on the said 29th day of April, 1873, said company was indebted to T. M. Bissell, as such treasurer, on account, in the sum of eight thousand eight hundred and thirty-two dollars and eighty cents, and on that day executed its note to him for that amount; and a meeting of all the directors and stockholders of said company was duly called, according to the by-laws of said company, and at said meeting the stockholders, officers and directors of said company resolved that the business of the company should be discontinued, and that the property of the company should be conveyed to the plaintiff, as trustee, to be converted into cash by him, and that the plaintiff should, out of the proceeds of the sale of said property, pay his costs, charges and expenses, and all the debts and liabilities of the company, and divide the surplus, if any, *pro rata* among the several stockholders, and directed that the secretary of the company should execute to the plaintiff proper deeds of conveyance and assignments thereof; that, accordingly, on the 1st day of May, 1873, the secretary did assign on the books of the company all of its personal property to the plaintiff, and on the 8th of May, 1873, executed to him a deed of conveyance of the land; that, on the 13th day of May, 1873, said Michael

De Camp, acting for himself and his wife, was, and still is, in possession of said real and personal property, but only as president of said company, and has no other right thereto; that, on said last named day, the plaintiff demanded and endeavored to take possession of said property, but the said defendants refused to allow him to do so, and retained possession thereof, and occupy and use the same, and refuse to allow the plaintiff to have, use or sell and dispose of the same, claiming and pretending that the resolution appointing the plaintiff trustee and directing the conveyances to be made to him is irregular and void, and the deed and assignment invalid, and that any sale of such property by plaintiff would convey no title; and they declare that they will not surrender possession of said property to plaintiff; and by reason of such unlawful acts of the defendants, the plaintiff cannot execute his said trust, and purchasers are deterred from purchasing such property, by reason of which the property is lying idle, and interest is accruing on the debts of said company. The defendants deny that anything is due to said Bissell.

Prayer, that the defendants be required to surrender said property to the plaintiff; that the defendants be enjoined from setting up any adverse title; that the plaintiff's title be quieted; that the court settle and determine the amount due to said Bissell; that the court direct as to the management of the said trust; and for other proper relief.

Several exhibits are filed with the complaint.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and because of want of capacity in the plaintiff to sue. The demurrer was overruled.

On petition of Thebus M. Bissell and Andrew Anderson, they were made defendants to the action, and filed an answer, in which they admit the facts to be as stated in the complaint.

De Camp and wife answered in four paragraphs. A demurrer to the first paragraph was sustained, and there

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was a reply to the other paragraphs. De Camp and wife filed an answer to the petition of Anderson and Bissell, and also a cross complaint against them, which was answered by a general denial. Upon a second trial by jury, there was a general verdict for the plaintiff and answers to sundry interrogatories propounded by the defendants.

The defendants De Camp and wife moved the court for judgment on the special findings of the jury; but their motion was overruled. They moved for a new trial, which was refused; and there was final judgment for the plaintiff according to the general verdict of the jury. The evidence is in the record by a bill of exceptions.

Errors are alleged as follows :

1. Overruling the demurrer to the complaint.
2. Sustaining the demurrer to the first paragraph of the answer.
3. Overruling the motion of De Camp and wife for a new trial.
4. Refusing to give instructions number five, six, seven and eight, asked by the defendants De Camp.
5. Overruling the motion of the defendants De Camp for judgment upon the special findings of the jury.

The first question to be determined is as to the sufficiency of the complaint. The question is argued under this assignment as to the power of a majority of the stockholders of a manufacturing corporation, under the laws of this State, to wind up its business against the wish of a minority. But we do not think that question is presented by this assignment. We understand the complaint to aver that the resolution to sell the property and wind up the affairs of the corporation was agreed to and adopted by all the stockholders, officers and directors of the company. The demurrer admits the truth of the allegation for the purposes of the demurrer.

The next question relates to the sufficiency of the first paragraph of the answer, to which a demurrer was sustained. It is alleged in that paragraph of the answer, that the defend-

ants De Camp, nor either of them, were present, nor did they vote for said resolution, nor consent thereto; and if they had been present, they, nor either of them, would have voted for said resolution; that, after the passage thereof, they disaffirmed the same, and have continually refused, and do now refuse, to recognize the same as binding upon them. The question discussed under the former assignment is presented here. We do not regard the act of the corporation in assigning its property to a trustee for the payment of the debts of the corporation, etc., as a surrender of its franchises as a corporation, and as working a dissolution of the corporation. A corporation may cease to do business, sell or assign its property for the payment of its debts, etc., and yet not cease to be a corporation. 2 Kent Com. 312. And see *Wilde v. Jenkins*, 4 Paige, 481; *Ward v. The Sea Ins. Co.*, 7 Paige, 294.

We regard the action of the corporation as amounting to an assignment of its property for the benefit of its creditors, etc., and nothing more. That a corporation may make such an assignment is well settled law. Burrill Assignments, 36, 548, *et seq.* Such an assignment may be made by the board of directors, without the express authority or consent of the stockholders. *Dana v. The Bank of the United States*, 5 Watts & Serg. 223; Burrill, *supra*. Cases where the power of the corporation is restricted by its charter or by general law must be excepted from the general rule. In this view of the case, the court committed no error in sustaining the demurrer to the paragraph of the answer in question, as without the assent of De Camp there was a majority of the directors voting for the resolution.

Counsel for the appellants submits that the franchises of the corporation could not pass to the trustee and be sold by him, except by the unanimous consent of all the stockholders. If this be conceded, it does not affect the case, as no claim is made by the plaintiff with reference to the franchises.

Under the third assignment, it is urged that the court erred in refusing to admit evidence of the amount or value

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of the property owned by De Camp and wife, with a view, as we infer, of showing that they could not bid on the property of the company when sold by the trustee. We do not see that there was any error in this. It was no bar to the action.

There was evidence offered and rejected on certain other points, but we do not see that there was any error in those rulings.

The motion for a new trial presented the question as to the sufficiency of the evidence to sustain the verdict of the jury, and counsel submit that question to us. In the view which we have taken of the case, we think there is no reason for disturbing the judgment on this ground.

The good faith of the directors in the passage of the resolution to make the assignment is discussed; but this is one of the questions decided by the jury, and we cannot say that under the evidence it was not correctly decided.

The same may be said as to the necessity or expediency of the assignment. We cannot say that the course pursued was not the most expedient under the circumstances.

The court instructed the jury at considerable length, giving them, as we think, all the information necessary to a full understanding of the law of the case. It was urged in the motion for a new trial that the court erred in refusing to give instructions five, six, seven and eight, asked by the defendants. We do not see that the giving of these instructions, conceding them to be correct, would have enabled the jury to comprehend and decide the questions involved, any more accurately than they could without them. Having fully presented the questions involved to the jury, it was not the duty of the court to give other instructions.

The special findings of the jury in answer to interrogatories are not inconsistent with the general verdict. One question about which there was much contention was, whether or not Anderson was, on the 29th day of April, 1873, the real owner in his own right of two shares of the stock of the company. The jury found that he was such owner. It was

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found that De Camp was not present at the meeting when the assignment was made, and that Anderson and Bissell, the other two directors, were present and voted for the resolution.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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## WILEY v. THE STATE.

**CRIMINAL LAW.—Evidence.—Acts of Accomplice not on Trial.**—Where, on the trial of a criminal action, it is shown that other persons, with the defendant, were parties to the crime, though they are not on trial, their acts, doings, and sayings may be given in evidence against their accomplice who is on trial.

**SAME.—Supreme Court.—Evidence.**—Where, on appeal to the Supreme Court in a criminal action, all the evidence is not in the record, the judgment against the defendant will not be reversed because of the admission of evidence set out in the record, which, though otherwise inadmissible, might have been rendered competent by other admissible evidence not in the record.

From the Decatur Circuit Court.

*J. S. Scobey*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

PETTIT, J.—Information for a riot against five persons, the appellant only being on trial. Trial by the court, without a jury, and finding of guilty. Motion for a new trial overruled; and this ruling alone is urged as error for which the judgment should be reversed. The whole evidence is not in the record, but it is claimed that the court erred in admitting the following evidence:

Witness. “I saw Wm. Myers, on the outside of the house, take off his coat and throw it down, and go into the house. George Jones, Wm. Myers, Oscar Rybolt, Pierce and Hamlin Anderson were intoxicated. I saw Taylor at the post-office, also James R. Wiley, George Jones, Lou Pumphrey, — Burney, Oscar Rybolt, Pierce, Wm. Myers,

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and Hamlin Anderson, before the fuss at Henderson's. I have seen Barkley since, and saw him shortly after the difficulty at the store. He has a scar on his cheek that will disfigure him for life."

The whole evidence not being in the record, we cannot say that it was error to admit this. It is a well established rule in criminal practice, that when it is shown that other persons were parties to the crime, though they are not on trial, their acts, doings and sayings may be given in evidence against their accomplice who is on trial. It may have been proved that all the persons named were parties to the crime.

The judgment is affirmed, at the costs of the appellant.

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### MCLAUGHLIN v. THE STATE.

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**NAME.**—*Idem Sonans.*—*Criminal Law.*—Prosecution by affidavit and information for assault and battery, the surname of the defendant being stated in the affidavit as "McGlofin," and in the information as "McLaughlin."

**Held,** that a motion to quash the information for variance in the name was properly overruled.

**SAME.**—*Recital of Name by Record.*—*Evidence.*—Where the record on appeal recites a name as that of a witness who gave testimony set out, but the name is not contained in what purports to be the statement made by the witness, it does not constitute a part of his testimony.

**SAME.**—*Evidence.*—Proof of an assault and battery on the person of Mrs. Grubbs could not sustain a prosecution for an assault and battery on the person of Caroline F. Grubbs.

From the Henry Circuit Court.

*J. Brown and J. M. Brown*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

**BIDDLE, J.**—Prosecution against the appellant by affida-

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vit and information, for an assault and battery on the person of Caroline F. Grubbs.

The affidavit states the name of the appellant as Raleigh McGlofin, and the information states it as Raleigh McLaughlin. The appellant moved to quash the information for this supposed variance in the name. His motion was overruled, and we think properly. There can be no substantial difference in the pronunciation of the name in either orthography. They are *idem sonans*. We think there is no danger of mistaking the identity of the person on trial on account of so slight a difference in the name; and, if acquitted, there would be no difficulty in pleading the record in bar of a subsequent prosecution for the same offence.

The appellant was tried, convicted and fined. He appeals. The evidence is before us. There is no proof of the name of the injured party. True, the record recites that "Mrs. Caroline Grubbs says, that, about the 29th of April, 1874, I was in the Gem Saloon," etc., etc.; but the part written in the third person is not, and does not purport to be, any part of Mrs. Grubbs' testimony. She testifies throughout her statement in the first person. The recital of a record is no part of a witness's testimony. *Wreidt v. The State*, 48 Ind. 579.

There is evidence in the record tending to show that the appellant committed an assault and battery on Mrs. Grubbs, but whether on Caroline Grubbs or not does not appear. In this respect, this case is the same as *McLaughlin v. The State*, ante, p. 279, and must be decided the same way.

The judgment is reversed, and the cause remanded, with instructions to grant the motion for a new trial, and for further proceedings.

DOWNEY, C. J., dissents, for the reasons stated in his dissenting opinion in the case of *Wreidt v. The State*, cited above.

Dawson v. The State.

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## ABEL v. THE STATE.

From the Marion Criminal Circuit Court.

*J. Denton*, for appellant.

*C. A. Buskirk*, Attorney General, and *J. M. Cropsey*, Prosecuting Attorney, for the State.

PETTIT, J.—Indictment for selling liquor on Sunday. Trial by the court; finding and judgment of guilty.

The only question is as to the sufficiency of the evidence. We have carefully read and considered it, and think the finding is sustained by it. We are referred to *Wreidt v. The State*, 48 Ind. 579. In that case the name of the person to whom it was alleged the liquor was sold was not proved; and the witness swore positively that he did not buy the liquor of the defendant. The evidence in this case is quite different on these points.

The judgment is affirmed, at the costs of the appellant.

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## DAWSON v. THE STATE.

CRIMINAL LAW.—*Malicious Trespass*.—The distinction between the civil action for trespass and the criminal prosecution for malicious trespass should be strictly maintained, and the criminal action should not be sustained as a means of redressing a private grievance, or for the purpose of determining the title to real estate.

SAME.—*Malice*.—*Evidence*.—Malice is an essential ingredient of the crime of malicious trespass; and where, on the trial of a prosecution for malicious trespass in removing a fence erected by the prosecuting witness, it was proved that the defendant, in removing the fence, acted under a claim of ownership of the land on which it was erected, through a long line of written title, with a colorable right, and under professional legal advice, and with apparent good faith, there could be no conviction.

From the Dearborn Circuit Court.

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Dawson v. The State.

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*J. W. Dawson, J. Schwartz and W. H. Bainbridge*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

BIDDLE, J. — Prosecution by affidavit and information against the appellant, for malicious trespass in removing a fence, the property of George Robertson. Trial, conviction, fine, appeal.

The record is lengthy and tedious. Without stating the proceedings in detail, suffice it to say that the appellant has brought the case before us upon its merits; and, without noticing various points elaborated in the brief for appellant, all of which fall within the main question, did the court err in overruling the motion for a new trial? we proceed at once to the ground of the controversy.

From the evidence, which is all before us, it appears that John Dawson, the father of the appellant, in 1812, became the owner of a certain quarter of a section of land, described, lying in Dearborn county, by purchase from the United States. In 1827, he sold and conveyed to Benjamin Williams a certain five acres of said quarter, described by metes and bounds, lying on the north side of the west fork of Tanner's Creek. Through several links in the chain of title, this five acres deeded by John Dawson to Williams became and now is the property of George Robertson, the prosecuting witness. The title to the remaining portion of the quarter, lying on the south side of Tanner's Creek, opposite the five acres so conveyed by John Dawson to Williams, has remained in the Dawsons continuously since 1812, and by descent became, and now is, the property of the appellant. The ancestor, John Dawson, after his sale and conveyance of the five acres to Williams, still claimed title to the bed of Tanner's Creek, as not included, in any part, in his conveyance to Williams, and before that time and afterwards, until his death, in 1848, exercised open acts of authority and ownership over the bed of the creek, by hauling stone therefrom, from parts which are now disputed grounds. The Dawsons, to whom the lands south of the creek descended, upon the

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death of their ancestor, still claimed title to the bed of the creek, and continuously exercised authority and ownership over it, until it became the property in severalty of the appellant, who has since continuously claimed the same rights and exercised the same authority over the disputed grounds. The Dawsons claim, and always have claimed, that the south line of the five acres conveyed by John Dawson to Williams runs along the north bank of Tanner's Creek, while Robertson seems to claim that the line should follow the thread of the stream. In May, 1875, Robertson erected a fence, by sinking posts and nailing boards upon them, several feet south of the north bank of Tanner's Creek, in the bed of the stream. The appellant, a short time afterwards, and after taking legal advice, gave Robertson written notice to remove the fence erected by him, within ten days, or the appellant would remove it himself. Robertson failed to remove the fence, as notified, and the appellant, on the 8th day of June, 1875, without doing any unnecessary damage, caused the same to be removed, by knocking off the boards, taking up the posts, and piling the lumber up on the north bank of Tanner's Creek, within the premises of Robertson, the prosecuting witness. These are the essential facts of the case.

We do not give any construction to the words in the several conveyances, by and through which Robertson holds title to his lands. We do not decide whether the line between these two neighbors runs along the north bank of Tanner's creek, or follows the thread of the stream. We intimate no opinion as to whether trespass would lie against the appellant, brought by Robertson in a civil action; nor as to which of these men might ultimately prevail in a trial of their civil rights as to the line between them. But we are clearly of the opinion that there is no sufficient ground for a criminal prosecution against the appellant. The distinction between trespass and malicious trespass must be carefully ascertained and firmly applied in each case. The redress for a trespass belongs to the action of the parties

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The State v. Waggoner.

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through the courts in a civil suit; the punishment for a malicious trespass belongs to the State in a criminal prosecution. The two must not be confounded as the same. A citizen may not invoke the severity of the criminal law to redress his private grievances. It was aptly said in the case of *Windsor v. The State*, 13 Ind. 375, by WORDEN, J., in delivering the opinion of this court: "We do not think a criminal prosecution a proper mode of trying the title to real estate;" and we think the words are particularly applicable to the present case. See, also, *Palmer v. The State*, 45 Ind. 388. Malice is an indispensable ingredient in the offence. It must be alleged and proved, or no conviction can follow.

In the case before us, there is no evidence of malice on the part of the appellant against the prosecuting witness, nor of any malicious intent in removing the fence. He acted under a long line of written title, with at least a colorable right, under professional advice, and with apparent good faith. Indeed, we think the evidence repels the idea of malice, instead of proving the fact beyond a reasonable doubt. It seems to us the court below failed to maintain the distinction between trespass and malicious trespass, so essential to the rights of the parties.

The judgment is reversed; cause remanded, with direction to grant the motion for a new trial, and for further proceedings.

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THE STATE v. WAGGONER.

CRIMINAL LAW.—*Indictment.*—*Intoxication in Public Place.*—An indictment under section 11 of the liquor law of 1875, for being found in a public place in a state of intoxication, described the place as "a public street, highway, and sidewalk, situated in" a county named "and State of Indiana."

*Held*, that the indictment sufficiently described a public place.

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The State v. Waggoner.

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SAME.—A public place, as intended by such a statute, is a place where all persons are entitled to be; and an indictment under the statute should describe the place with reasonable certainty, so that the court may see that it is a public place, within the meaning of the statute.

From the Greene Circuit Court.

*C. A. Buskirk*, Attorney General, and *A. M. Cuning*, Prosecuting Attorney, for the State.

*A. G. Cavins* and *E. H. C. Cavins*, for appellee.

BUSKIRK, J.—The appellant was indicted under the 11th section of the act of 17th of March, 1875. Acts 1875, Spec. Sess. 55. The court quashed the indictment. The State excepted and prosecutes this appeal. The indictment charges, that “one George Waggoner was then and there found in a public street, highway and sidewalk, situated in Greene county and State of Indiana, unlawfully in a state of intoxication.”

The statute is, “any person of sound mind found in any public place in a state of intoxication, shall be deemed guilty of a misdemeanor,” etc. Acts of 1875, Spec. Sess., p. 57.

The indictment was quashed in the court below, as we are informed by the brief of the prosecuting attorney, upon the ground that it did not sufficiently describe a public place.

It has been held that, to constitute an offence under the above quoted section, the accused must be found in a public place; and a public place was held to be where all persons were entitled to be; and that a party given by a private citizen, where the guests were invited, was not a public place within the meaning of the above section. *The State v. Sowers*, ante, p. 311.

Hence, it is necessary that the indictment should, with reasonable certainty, describe the place where the accused was found, so that the court may see that such place is a public place, within the meaning of the statute.

The definition of the offence of being found in a public place in a state of intoxication is very similar to the lan-

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guage used in defining an affray. To constitute an affray, the fighting must be by agreement in a public place. There is no reason why the description of the public place should be different in the two offences. A description which would be good in an affray ought to be sufficient in an indictment for being found intoxicated. The recognized form for an indictment for an affray is \* \* \* "then and there, in a certain public street and highway there situate, unlawfully," etc. Arch. Cr. Pl., 2d Am. from 3d London ed., 385; Arch. Pl. & Ev., 10th London ed., 599; 2 Bish. Cr. Pro., secs. 16, 19 and 23; Whart. Prec. 850; Bicknell Cr. Pr. 395.

Bishop adopted the form used by Archbold, and in speaking of the allegation of place, says:

"In the form which we have extracted from Archbold, the allegation is, that the offence occurred in a certain public street and highway; and there is no reason to doubt the sufficiency of the form in this respect."

We think the indictment is good, and that the court erred in quashing it.

The judgment is reversed, with costs; and the cause is remanded with directions to the court below to overrule the motion to quash, and for further proceedings.

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THE STATE v. DAY.

**CRIMINAL LAW.—***Bill of Exceptions.*—A bill of exceptions is not necessary to present for the consideration of the Supreme Court the ruling of a court in quashing an indictment.

**SAME.—***Transcript on Appeal by State.*—Section 155 of the criminal code applies only to a case where a bill of exceptions is necessary to raise the questions presented.

**SAME.—***Words.*—"*Ditch.*"—"*Embankment.*"—*Obstruction of Highway.*—Words in an indictment, except such as are technical or defined by law, must be construed in their common and usual acceptation. An indictment for obstructing a highway by unlawfully cutting a "ditch alongside of, and making an embankment alongside of and across said highway, thereby

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causing water to flow in said road," was not bad for its failure to allege the depth of the ditch and the height of the embankment.

From the Putnam Circuit Court.

*C. A. Buskirk*, Attorney General, *R. D. Doyle* and *T. C. Grooms*, for the State.

*M. A. Moore*, *G. Moore* and *D. R. Eckles*, for appellee.

BIDDLE, J.—The indictment in this case charges the appellee as follows:

"That, at said county of Putnam, on the 7th day of May, 1875, one Vincent Day did, then and there, unlawfully obstruct a certain highway, then and there situate, running through section No. 31, town 15, range 3, and leading from the Greencastle and New Maysville road, in said county, by then and there unlawfully cutting a ditch alongside of, and making an embankment alongside of and across said highway, thereby causing the water to flow in said road; contrary," etc.

On motion of appellee, the indictment was quashed. The State excepted, and appeals to this court. The appellee here moves to dismiss the cause, "because no bill of exceptions was filed in the court below, and because no order of court was made in the court below as to what part of the record in this cause should be certified into this court."

We do not think a bill of exceptions was necessary in this case. The purpose of a bill of exceptions is to bring into the record something which otherwise would not properly belong to it. It is never necessary when the question arises on the face of the pleadings. Here the question is upon the sufficiency of the indictment, raised by the motion to quash. No extrinsic fact is necessary to its presentation. It is all upon the record, and the clerk has officially certified that this record is "true, full and complete." We cannot, therefore, see the force of a motion to dismiss the cause for the reason that the court below made no order as to what part of the record should be certified. Section 155 in the act regulating criminal pleading and practice (2 G. & H. 426)

applies only to cases where a bill of exceptions is necessary to raise the question presented, and where it is not necessary for the clerk to certify "any part of the proceedings and record, except the bill of exceptions and the judgment of acquittal."

We are informed by the briefs of the counsel, that the ground upon which the court below sustained the motion to quash the indictment was the failure to allege the depth of the ditch and the height of the embankment, which, it is averred, obstructed the road.

Words used in an indictment, except such as are technical, or defined by law, must be construed in their common and usual acceptation. A trace across a highway, insufficient to seriously obstruct it, could not, with propriety, be called a ditch; and to call a ridge of earth an embankment, which was so inconsiderable, when raised across a highway, as not to be a serious obstruction, would be quite frivolous.

The allegations, "by then and there unlawfully erecting fences across said highway" (*State v. Buxton*, 31 Ind. 67), and "by then and there manufacturing a rail fence across said road, against the statute" (*Jeffries v. McNamara*, 49 Ind. 142), have been held good by this court, without averring the height of the fences; and we think the same is properly applicable to ditches and embankments. In our opinion, the word "ditch," in its common and usual signification, as generally accepted, imports a trench of sufficient width and depth to obstruct a highway, in the legal sense, if cut or dug across it; and it seems very plain that the word "embankment," in its common, usual and accepted meaning, fairly imports a ridge of earth of sufficient height and base to form a serious obstruction to a highway, if raised across its passage.

We are constrained to hold that the averments under consideration are sufficient, and that the court erred in quashing the indictment.

The judgment is reversed, at the costs of the appellee;

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the cause remanded, with instructions to overrule the motion to quash the indictment, and for further proceedings.

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THE STATE v. DAY.

From the Putnam Circuit Court.

*C. A. Buskirk*, Attorney General, *R. D. Doyle* and *T. C. Grooms*, for the State.

*M. A. Moore*, *G. Moore* and *D. R. Eckles*, for appellee.

DOWNEY, C. J.—The questions in this case are the same as those in *The State v. Day*, ante, p. 483, and for the reasons there stated the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded.

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ALLEN v. THE STATE.

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LIQUOR LAW.—*Sale or Gift of Intoxicating Liquor to Minor, etc.—Constitutional Law.*—It is settled that the sixth section of the act of February 27th, 1873, making it “unlawful for any person, by himself or agent, to sell, barter or give intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated,” was not unconstitutional.

NAME. — *Descriptive Affix. — Criminal Law.* — The addition of “Senior” or “Junior” to the name of a person in an indictment is mere matter of description, and the affix forms no part of the name, and need not be proved where proof of the name is necessary.

From the Kosciusko Circuit Court.

*C. Clemans*, *E. Haymond* and *L. W. Royce*, for appellant.

*C. A. Buskirk*, Attorney General, *R. D. Doyle* and *S. W. Corand*, for the State.

BUSKIRK, J. — Conviction under the sixth section of the

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act of 27th February, 1873, for giving intoxicating liquor to a minor.

The court overruled a motion to quash the indictment. It is claimed, in argument, that said section is unconstitutional. It has been held to be constitutional and valid, and has been enforced in many cases. *Williams v. The State*, 48 Ind. 306; *Hanson v. The State*, 43 Ind. 550; *Farrell v. The State*, 45 Ind. 371; *Connell v. The State*, 46 Ind. 446; *The State v. Young*, 47 Ind. 150; *Fountain v. Draper*, 49 Ind. 441; *Meyer v. The State*, 50 Ind. 18. We regard the question as settled and put at rest.

It is also claimed that the court erred in overruling the motion for a new trial. It is urged that the verdict is not sustained by the evidence, in this, that the indictment charges a gift, and the evidence shows a sale.

The proof shows both a gift and a sale. The witness testified: "I bought some liquor, and he treated me to some whiskey, and I was not twenty-one yet." Upon cross-examination, he testified: "About the 22d of January, 1874; got it of Allen himself. I don't know whether I paid for it or not, and I bought it on time. I bought by the half pint and by the quart. I don't remember the exact amount of liquor I bought. I bought it in a bottle. He treated me. He did not treat me when I got it in the bottle. He called me up to the bar and treated me. It was some time within the present year, 1874. I cannot state the exact day, or time of day. He treated me two or three times. I don't remember the number of times. I don't remember how much I was to pay him at any of the times," etc.

We think the evidence fully establishes a gift to a minor. There is also evidence of a sale, but this was at another time. He testified that Allen never treated him when he bought whiskey in a bottle.

It is also insisted that there is a variance between the allegations of the indictment and the proof. The indictment charges that the liquor was given to Robert McNeal,

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Jr. The proof is, that it was given to Robert McNeal. There is no evidence as to whether he was junior or senior or simply Robert McNeal.

The objection is untenable. The addition of "senior" or "junior" to a name is a mere matter of description, and forms no part of the name. *People v. Cook*, 14 Barb. 259; *Commonwealth v. Perkins*, 1 Pick. 388; *State v. Grant*, 22 Me. 171; *Coit v. Starkweather*, 8 Conn. 289; *Commonwealth v. East Boston Ferry Co.*, 13 Allen, 589; *Hoadgson's Case*, 1 Lewin, 236; *Rex v. Peace*, 3 B. & Ald. 579.

The judgment is affirmed, with costs.

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DAVIS v. THE STATE.

**LIQUOR LAW.—Keeping Disorderly House.—Indictment.**—An indictment under section 17 of the act of March 17th, 1875 (Acts 1875, Spec. Sess., 58), for keeping in a disorderly manner a house, etc., wherein intoxicating liquors are sold, which, besides averring that the defendant had a license, does not also aver the place to which his license was applicable, and that that place was kept in a disorderly manner, is bad on motion to quash.

From the Fayette Circuit Court.

*B. F. Claypool* and *W. C. Forrey*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

**BIDDLE, J.**—Indictment for keeping a house, wherein spiritous liquors were sold, in a disorderly manner. The appellant was tried, convicted and fined, and his license adjudged forfeited. He excepted, and appeals to this court.

The charging part of the indictment is as follows:

"That one George M. Davis, late of said county, on the 1st day of June, A. D. 1875, at said county and State aforesaid, and continuously up to the time of making this presentment, he being then and there licensed according to the provisions of an act of the legislature of Indiana, approved

March 17th, A. D. 1875, to sell spiritous and malt liquors in a less quantity than a quart at a time, to be drunk upon the premises where sold, bartered and given away, then and there unlawfully kept a house wherein spiritous, vinous and malt liquors were sold as aforesaid, and drunk upon the premises as aforesaid, in a disorderly manner, in this, that he did suffer and permit divers persons on week days and Sundays, by day and by night, to congregate in and about said house, and make a great noise by yelling, quarrelling, loud talking, fighting, swearing, to the disturbance and annoyance of divers good citizens of said county; contrary," etc.

A motion to quash the indictment was made, overruled, and exception taken; and this ruling presents a material question in the case. The indictment was found under section 17 of the act of March 17th, 1875 (Acts of Special Session, page 58), which enacts that "every place, house, arbor, room or shed, wherein spiritous, vinous or malt liquors are sold, bartered, or given away, or suffered to be drunk, if kept in a disorderly manner, shall be deemed a common nuisance, and the keeper thereof, upon conviction, shall forfeit his license and be fined in any sum not less than ten nor more than one hundred dollars."

There is a proviso in this section as to the time the act shall go into force, but it need not be stated, as it does not affect the present case. Section 3 of the act requires the person desiring to obtain license to state in his notice "the precise location of the premises in which he desires to sell;" and the license granted under section 4 can be applicable only to such place. It seems plain, then, as the forfeiture of the license must be a part of the penalty, that the indictment should aver the license, and the place to which it is applicable, and that the place, house, arbor, room, or shed, was kept in a disorderly manner; otherwise, as the license is not general, but applicable to a "precise location," the court could not adjudge what license was forfeited; and a defendant might be fined, and forfeit his license applicable to some "precise location" which was kept in an orderly

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manner by keeping some other house in a disorderly manner. The legislature certainly did not contemplate such consequences when they enacted the law, and a construction of the act that would lead to such results, we think, would be unwarranted.

If we are right in this view, the indictment, as it does not aver the place to which the appellant's license was applicable, and that that place was kept in a disorderly manner, is insufficient.

There are other points made in the record, but as they are not likely to occur in the same manner on another trial, we do not decide them.

The judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

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POST, ADM'R, v. PEDRICK.

**PLEADING.—Contract.**—To a complaint alleging a breach of contract to convey an interest in certain leases, in that the defendant had sold the same to other parties, an answer that the title of defendant was absolute and perfect, and the defendant was ready and willing and offered to comply with his contract, may have amounted to an argumentative denial, but, if so, there was no available error in sustaining a demurrer to it, where an answer of denial also was filed.

**SAME.—Decedents' Estates.—Claims.**—To file a claim against a decedent's estate, it is not required that there be a regular complaint constructed according to the ordinary rules of pleading, but merely a succinct statement of the claim, which will be sufficient when it apprises the administrator of the nature of the claim, and the amount demanded, and shows enough to bar another action for the same demand. Therefore, where the complaint alleged that the claimant had paid to the decedent a certain sum of money, which he had agreed to repay to the claimant in default of conveying to him an interest in certain leases, and that the decedent had conveyed to other persons, it was, on demurrer, held sufficient as an allegation that the decedent had rescinded the contract, and showed a right in the claimant to recover what he had paid.

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Post, Adm'r, v. Pedrick.

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From the Marion Civil Circuit Court.

*S. Claypool, J. L. Mitchell and W. A. Ketcham*, for appellant.

*W. Morrow and N. Trusler*, for appellee.

WORDEN, J.—The appellee filed the following claim against the estate of the deceased:

“Pedrick claims of the estate of Gustavus Schurmann, deceased, four hundred and fifty dollars and interest thereon from February 11th, 1868, as follows: He avers that on the 11th day of February, 1868, he paid to Gustavus Schurmann five hundred dollars, which sum the said Schurmann agreed to pay back to him at the end of ten days, or convey to him one-half interest in certain leases of coal oil territory and wells, provided he, the said Pedrick, should elect to take an interest in said leases, as per written contract herewith filed; and he avers that he did not convey to him such interest in said leases, but, on the contrary, sold the same to other parties; that said sum and interest, except fifty dollars, which was afterwards paid back to him by said Schurmann, as will appear by note held by said Schurmann's estate, is now due and wholly unpaid; wherefore,” etc.

There was another paragraph for money lent by the plaintiff to Schurmann, for money had and received by Schurmann for the use of the plaintiff, and for money paid by the plaintiff for the use of the deceased.

The written contract referred to in the first paragraph is as follows:

“On last January, 27th, I purchased for sixteen hundred dollars, from Wm. Newman, of Louisville, the two leases he held from Richard Poteet and wife, of Overton county, Tenn., and from B. C. Webb and wife of Putnam, Overton county, Tenn., conveying to him the sole and exclusive right to explore, bore and mine for oil and other things on their lands. I handed said leases to William Pedrick, of Richmond, Ind., to examine the title to said conveyances, and, when found correct, to have the same recorded in the

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records of the said counties; and I hereby obligate myself to convey and transfer one-half of my interest in said leases to said Pedrick, for one-half of the said purchase price, in case he pays me the respective money within three months from and after this date; also, the said Pedrick paid me to-day on account of said leases the sum of five hundred dollars, which said money I promise to refund him in case he should find the title to said leases deficient, and therefore prefer not to purchase said one-half interest; further, said Pedrick is to inform me within ten days from and after this date, whether the title to said leases is good or not, and whether he wants to buy said one-half interest therein, for the reason that said William Newman, either wants the purchase-money by the 25th inst., or that his said sale and transfer of the said leases to me be cancelled and annulled.

“Witness my hand and seal at Indianapolis, this 11th day of February, 1868. G. SCHURMANN. [Seal.]”

The defendant demurred to the first paragraph for want of sufficient facts, but the demurrer was overruled, and exception taken.

Answer, first, general denial; fourth, in substance, that both paragraphs of the complaint were for the same thing; that the money received by the deceased was received under and by virtue of the written contract, which is made a part of the answer, and “that the title of said Newman and said decedent was absolute and perfect, and said decedent stood prepared and ready, and was willing and anxious at all times, to comply with his said contract as set forth in said memorandum, and offered to perform all and singular the conditions in said memorandum expressed; and the defendant has, since his appointment, been ready and willing to perform the contract of said decedent, and is now ready and willing, upon the performance by said plaintiff of his said contract, to transfer and assign to plaintiff the half interest in all of said leases.”

A demurrer for want of sufficient facts was sustained to the fourth paragraph of answer, and exception.

Trial by jury, verdict and judgment for the plaintiff for five hundred and eighty-seven dollars and twenty-five cents, the defendant having interposed an unsuccessful motion for a new trial.

Errors are assigned upon the rulings on the demurrers. We will consider the fourth paragraph of the answer first.

The allegation in the answer of a constant readiness and willingness to perform cannot be reconciled, in any mode that occurs to us, with the allegation in the complaint that Schurmann had sold the interest to third parties. The allegations of the answer, however, may amount to an argumentative denial of the matter thus alleged in the complaint; but, if so, no available error was committed in sustaining the demurrer to the paragraph of answer, inasmuch as the whole complaint was put in issue by the general denial. The matters alleged in the answer could have been given in evidence under the general denial, because they would tend to negative the allegations of the complaint.

Was the first paragraph of the complaint good? It goes upon the theory that as Schurmann had put it out of his power to comply with his contract, by selling the interest to other parties, the plaintiff had a right to treat the contract as rescinded, and recover back what he had paid upon it.

In *Hannum v. Curtis*, 13 Ind. 206, it was held that the statute on the subject of filing claims against estates did "not require a regular complaint under the ordinary rules of pleading, but merely a succinct statement of the claim, which, it seems to us, will be sufficient when it apprises the defendant of the nature of the claim, of the amount demanded, and shows enough to bar another action for the same demand." See, also, *Ginn v. Collins*, 43 Ind. 271.

We are of opinion, in view of the above authorities, that the first paragraph was sufficient, though the facts showing the plaintiff's right to rescind and recover back what he had paid are rather meagrely stated.

One of the reasons assigned for a new trial was, that there

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Post, Adm'r, v. Pedrick.

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was error in the assessment of the amount of the recovery, it being for too large a sum.

As we have concluded that the amount was too large, and that for this reason the judgment will have to be reversed, it will be unnecessary to consider other reasons for which a new trial was asked.

The amount of the recovery was the four hundred and fifty dollars demanded, with the interest thereon from February 11th, 1868, up to the time of the verdict.

The defendant pleaded payment by the intestate, and it was proved that on June 25th, 1868, Schurmann gave Pedrick a bank check for fifty dollars; and again a like check for the same amount on July 20th, 1868. The following receipt was also given in evidence:

“Repaid me by G. Schurmann again from the payment I made him on last February 11th, on account of my half interest in the Webb & Poteet leases in Overton county, Tenn., thirty-five (35) dollars, on this Sept. 14th, 1868.

“WILLIAM PEDRICK.”

The above receipt speaks for itself; and there was no evidence to show that the two checks above mentioned pertained to any other transaction, or were given for any other purpose; nor was it shown that the parties then had any business transactions, or that Schurmann owed the appellee any other debt. We think it clear that the two checks and the receipt should have been allowed the appellant as payments on the claim sued upon. There were two other checks previously given by Schurmann to Pedrick, each for fifty dollars, one dated March 11th, 1868, and one March 27th, of the same year, which perhaps should not have been allowed, inasmuch as there was some evidence tending to show that Pedrick was then engaged in the oil business either with or for Schurmann, and perhaps it might be inferred that the checks had relation, in some way, to that business.

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Ragsdale *et al.* v. Mathes.

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The judgment below is reversed, with costs, and the cause remanded for a new trial.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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RAGSDALE ET AL. v. MATHES.

**SHERIFF'S SALE.** — *Redemption of Real Estate.* — *Rents and Profits.* — Where the rents and profits of real estate for a term of years, not exceeding seven years, are sold by the sheriff on execution, the interest so sold may be redeemed within one year from the date of the sale, under the provisions of the act of June 4th, 1861, 2 G. & H. 251, and the purchaser at such sale is not entitled to possession during such period; the provisions of said act being applicable in such case, as well as where the fee simple is so sold.

52	495
137	329
52	495
141	449

From the Johnson Circuit Court.

*R. M. Johnson*, for appellants.

*G. M. Overstreet* and *A. B. Hunter*, for appellee.

**BIDDLE, J.** — The facts alleged in the complaint, necessary to a decision of this case, may be stated, in their proper order, as follows:

Robert A. Alexander recovered a judgment before Solomon W. Clemmer, a justice of the peace, against John M. Simpson, for forty-seven dollars and forty-six cents, with costs, and afterwards, on the 8th day of August, 1873, filed a transcript thereof in the clerk's office of the Johnson Circuit Court. On the 2d day of February, 1874, John M. Maxwell recovered judgment, in the Johnson Circuit Court, against John M. Simpson, for one hundred and eighty-one dollars and ninety-five cents, with costs. On the 24th day of April, 1874, executions were issued on said judgments, out of the clerk's office of the Johnson Circuit Court, to the sheriff of Johnson county, who levied the same on certain lands belonging to said John M. Simpson, and afterwards,

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on the 16th day of May, 1874, sold the rents and profits of the same for the term of seven years to the appellants, and executed a lease for the premises to them, for seven years from and after the day of sale.

The appellants, before the commencement of this suit, demanded possession of the premises from the appellee, who, as they allege, wrongfully claims a right thereto, and who refused their demand. Prayer for possession and damages.

There is no direct averment, in the complaint, of the right of possession in the appellants. The only title they show is derived through their purchase at the sheriff's sale and the lease made to them by the sheriff.

The court sustained a demurrer, for want of sufficient facts, to the complaint, and rendered judgment for appellee. The exceptions, appeal and assignment of error properly raise the question of the sufficiency of the complaint, which is the only point in the case.

The appellants earnestly insist that a term for the rents and profits of land, when sold at sheriff's sale, cannot be redeemed under the act of June 4th, 1861, and have presented us with an elaborate printed argument; but they have failed to convince us that their views are correct. Section 463, 2 G. & H. 246, provides for the sale of the rents and profits of land for a term not exceeding seven years, and sections 464 and 465 provide how it shall be done; and the first section of the act of June 4th, 1861, 2 G. & H. 251, provides, "that whenever, hereafter, any real property or any interest therein shall be sold on any execution or order of sale issued upon any judgment, decree or other judicial proceeding within this State, the owner thereof, his heirs, executors, administrators, or any mortgagee or judgment creditor having a lien upon the same may redeem such real property or interest therein, at any time within one year from the date of such sale, by paying to the purchaser, his heirs or assigns, or the clerk of the court from which such execution or order of sale was issued, for the use of such

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*Ragsdale et al. v. Mathes.*

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purchaser, his heirs or assigns, the purchase-money, with interest thereon at the rate of ten per cent. per annum."

The second section provides, that, "upon payment of the purchase-money, the sheriff or other officer making such sale shall issue to the purchaser a certificate, showing the court in which the judgment or decree was rendered, the parties to the action, the date of the sale, the name of the purchaser, the amount of the purchase-money, and a description of the premises sold, which certificate shall entitle the holder thereof to a deed of conveyance, to be executed by the officer making the sale, at the expiration of one year from the date of such sale, if the property shall not have been previously redeemed. The judgment debtor shall be entitled to possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits."

Sections 463, 464 and 465 of the code and the act of June 4th, 1861, are in harmony, and may be construed together.

The appellants seem to think, because the act of June 4th, 1861, provides that the sheriff shall issue to the purchaser a certificate of the sale, which, upon failure to redeem, shall entitle him to a deed of conveyance, and nowhere uses the word "lease," that their purchase in this case is not within the act; and, therefore, that they are entitled to enter upon their term at once, without its being subject to redemption by the owner. But we think differently. A deed of conveyance for a term of years in land, if it be for a less estate than the lessor holds therein, is a lease—nothing more, nothing less, nothing else. It would, indeed, be a most anomalous construction of the act, to hold that the owner could redeem a fee simple, yet could not redeem a term of years, when it expressly provides for the redemption of any real property or any interest therein.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

Gatling v. Dunn *et al.*

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## JONES ET AL. v. THE STATE.

From the Decatur Circuit Court.

*J. S. Scobey*, for appellants.

*C. A. Buskirk*, Attorney General, for the State.

WORDEN, J.—George Jones, Samuel Jones and Buchanan Wiley were indicted jointly for aiding one James Peck, a prisoner confined in the jail of Decatur county, Indiana, on a charge of larceny, to escape from said prison.

Samuel Jones and Buchanan Wiley were put upon trial for the offence, before the court, without a jury, and upon such trial were convicted.

The case is before us on the evidence, the only question being whether that is sufficient to sustain the finding. Upon a careful examination of the evidence, we are of opinion that it reasonably sustains the finding, and that the judgment must be affirmed.

The judgment below is affirmed, with costs.

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GATLING v. DUNN ET AL.

SHERIFF'S SALE.—*Property Sold Subject to Incumbrance.—Redemption Law of 1861.*—The provision of the first clause of section 452, 2 G. & H. 244, that "when any property shall be sold subject to liens and incumbrances, the purchaser may pay the liens and incumbrances, and hold the property discharged from all claims of the execution-defendant," is not repealed by the redemption law of 1861, 2 G. & H. 251, so far as it affects the right of redemption existing by the general principles of law and held by one not a party to the judgment on which the sale was made.

SAME.—*Sale Under Junior Judgment.*—Certain real estate subject to the lien of two judgments, rendered in favor of different plaintiffs at different times, against the owner of such real estate, was sold on execution issued on the junior judgment to one not a party to either judgment, who, after he had received the sheriff's deed, sold and conveyed the land to the senior judgment-plaintiff, who took and kept possession of the land, still

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holding said senior judgment, which remained unpaid and unsatisfied on the record.

*Held*, that said senior judgment remained in force against the land and against the judgment-defendant, and execution might be issued thereon, notwithstanding said purchaser at sheriff's sale elected, in his mind or in expressed words, to take and hold the land subject to said senior judgment, and to pay off and satisfy the same, and hold the property, and his vendee, said senior judgment-plaintiff, purchased with notice of such election, himself electing in like manner.

**SAME.—Redemption of Land.—Statutes.**—There is no common law right to redeem land sold on a judgment at law, where the lien is general; and the provision of the second clause of section 452, 2 G. & H. 244, that the purchaser of property sold subject to liens and incumbrances "may hold the property subject to be redeemed," without limitation as to time, "by the execution-defendant, his heirs or assigns, by paying to the purchaser, his heirs or assigns, the purchase-money, with interest" at the legal rate of six per cent. per annum, was repealed by the act of 1861, 2 G. & H. 251, which provides that the redemption must be within one year from the date of the sale, by paying the purchase-money, with interest thereon at the rate of ten per cent. per annum.

From the Marion Civil Circuit Court.

*N. B. Taylor, F. Rand, E. Taylor, R. B. Duncan and J. S. Duncan*, for appellant.

*J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler*, for appellees.

**BIDDLE, J.**—Suit by appellant against Jacob P. Dunn and George Tousey, executors of the last will and testament of Isaac Dunn, deceased, and Nicholas R. Ruckle. The complaint contains three paragraphs.

The appellant, in his brief, states the facts alleged in the first paragraph, as follows:

"On the 3d day of February, 1862, Isaac Dunn recovered a judgment in the court of common pleas of Marion county, Indiana, against Richard J. Gatling, as principal debtor, for the sum of eleven hundred and sixty-nine dollars and fifty cents, without any relief from valuation laws. On the 4th day of March, 1863, Sarah Hamilton recovered a judgment in the circuit court of said county, against said Richard J. Gatling, as principal debtor, for five hundred and sixty-two dollars and fifty cents.

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Gatling v. Dunn *et al.*

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“At the time of the rendition of said first judgment, said Gatling was the fee simple owner of a parcel of real estate, described by metes and bounds, in the city of Indianapolis, in said county and State, upon which the said judgment became a lien from and after the date of its rendition, and the other judgment also from the date of its rendition; the last being junior to the first. An execution was issued upon the junior judgment to the sheriff of said county, who levied the same upon and took in execution the said real estate of said Gatling, subject to the lien of said first judgment. This execution was returned, and a *venditioni* issued, commanding the sale of the premises to satisfy said junior judgment, without relief from valuation or appraisement laws.

“By virtue of said writ of *venditioni*, on the 16th day of July, 1864, the sheriff of said county sold said premises of said Gatling to Sims A. Colley, for the sum of sixty dollars, which was paid by said Colley, and the sheriff executed and delivered a deed for said premises to said Colley; the sale and purchase being made subject to the said first judgment of said Isaac Dunn, by said Colley, who elected to take and hold the premises subject to, and to pay off and satisfy said Dunn’s prior judgment, and to hold the premises.

“On the 30th day of December, 1865, Sims A. Colley, without having paid off said Dunn’s prior judgment, subject to which he had purchased and took the premises, sold and conveyed the same to said Dunn, who still held the prior judgment and lien for one hundred dollars, which he paid to Colley, and took a deed therefor, and entered into and took possession of the same; and said Dunn purchased the premises of said Colley, and took the deed from him therefor, with full knowledge that Colley had purchased the same subject to his, Dunn’s, judgment and lien, and elected to hold the same subject thereto, and to pay off and satisfy the same, and entered into and took possession of the same, subject to the payment of his prior judgment, in like manner as said Colley, and elected to take and hold the same as in and for full satisfaction and discharge of his prior judgment and

lien on the same, and to consider and hold the said judgment satisfied and discharged; and from the time that he procured said deed from said Colley to the time of his death, viz., for a period of seven years, he took no steps to collect his said judgment.

“Isaac Dunn died on the — day of October, in the year 1866, being at the date of his death the owner and in possession of said real estate, under the purchase and deed from said Colley, subject to the lien and payment of his, said Dunn's, judgment, and to pay and satisfy which judgment, he, said Dunn, had purchased, taken and held said real estate from said Colley, to the date of his, said Dunn's, death; said Dunn having failed only to enter satisfaction of his prior judgment on the records of said court of common pleas.

“The defendants Jacob P. Dunn and George Tousey were named executors in the last will of said Isaac Dunn, and after his death were appointed and qualified as such, and continue to act in that capacity. As executors of the last will of said Isaac Dunn, the said executors took no steps for the collection of said Isaac Dunn's judgment, until the 20th day of September, 1872, when they, in violation of the rights of said Gatling, and against the said action and election of said Isaac Dunn, caused an execution to be issued on said judgment of Isaac Dunn, and to be placed in the hands of said defendant Ruckle, sheriff of said county, to be executed, who demanded payment of said judgment, and threatened to execute said writ; and execution has, from time to time, been renewed, and payment demanded; and the said executors, defendants, still demand payment of said judgment, and threaten to enforce the collection thereof, notwithstanding the satisfaction and discharge of said judgment by the action and election of said Isaac Dunn, by and through which said judgment is lawfully satisfied and discharged at the time of and before the decease of said Isaac Dunn.

“The said real estate of said Gatling was, at the time of its purchase by said Colley, and when said Colley deeded it to said Dunn, of the fair cash value of one thousand five

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hundred dollars, and more than enough to pay and satisfy said Isaac Dunn's judgment and the said bid of said Colley, as well as the sum paid by said Dunn to said Colley.

"The relief demanded is, that the said execution, or any execution, in the hands of the sheriff, on said Isaac Dunn's judgment, be directed to be returned, and that said Isaac Dunn's judgment be adjudged satisfied, and that it be directed to be entered satisfied in full, either by the defendants, executors, or by some proper person appointed by the court for that purpose, and for other proper relief."

The second paragraph of the complaint is substantially the same as the first, with the additional averments, that after the death of Isaac Dunn, his executors conveyed the land to William Love, with notice; that Love afterwards conveyed the same to Nicholas R. Ruckle, with notice; that Ruckle is in possession; that before the commencement of this suit the appellant tendered to Ruckle the full amount of purchase-money paid at the sheriff's sale, with interest, and demanded of Ruckle a reconveyance of the land to the appellant. Prayer to redeem.

The third paragraph of the complaint is less full in its averments than the second, but in no respect legally different, as far as we can discover.

A separate demurrer, alleging the insufficiency of facts, was sustained to each paragraph of the complaint. The appellant refused to amend, and the court pronounced judgment against him. Exceptions and appeal. The sole question before us is the sufficiency of the several paragraphs of the complaint.

The appellant claims the right, under the first paragraph of his complaint, to have satisfaction of the judgment against him in favor of Isaac Dunn entered of record by decree, according to the first clause of section 452, 2 G. & H. 244, which enacts: "When any property shall be sold subject to liens and incumbrances, the purchaser may pay the liens and incumbrances, and hold the property discharged from all claims of the execution-defendant." He insists that this

clause of the section is not repealed by the act of June 4th, 1861, 2 G. & H. 251, and we think correctly, so far as it affects the right of redemption existing by the general principles of law, and held by one not a party to the judgment on which the sale was made. *Holmes v. Bybee*, 34 Ind. 262; *May v. Fletcher*, 40 Ind. 575.

But the appellant has not brought himself within the first clause of that section. The complaint contains no direct and traversable averment that Colley, the purchaser at the sheriff's sale, or any of the vendees that held the land subsequently to him, paid or in any way satisfied the judgment of Isaac Dunn, which was a lien on the land at the time of the sale. The allegation that Colley "elected to take and hold said premises subject to said Dunn's judgment, and to pay off and satisfy the same, and hold the said real estate," is not sufficient. It was optional with Colley to pay the lien and hold the land, or not; he could not be compelled to do so; and an election existing merely in mental intention, or even in expressed words, to do an optional act, is not binding. It must be made an accomplished fact, before it can become the foundation of a sufficient averment. The sale of the land afterwards by Colley to Isaac Dunn, with notice, conveyed no more to Dunn than was in Colley; and the averment that Dunn elected to take and hold the land, by discharging the lien to which it was subject, is no better than the one we have just noticed. If the sale of the land by Colley had been to a stranger to the record, it is very clear that it would not have affected Dunn's right to have execution of his judgment, unless the lien was actually paid; and we cannot perceive how Dunn could take any more, less, or different right by his purchase from Colley than if he had been a stranger.

The land is still subject to sale on the judgment in favor of Isaac Dunn. If, when subjected to such sale, it should not sell for enough to pay the judgment of Dunn, he would be entitled to collect the balance due him. It would, therefore, be unjust to compel Dunn to enter satisfaction of his

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judgment before such sale was made. If it should sell for more than would pay Dunn's judgment, the surplus could be disposed of according to the rights of the parties concerned.

In our view the first paragraph of the complaint is insufficient.

The appellant's right to redeem under the second and third paragraphs of the complaint must depend upon statute. A mortgagee has the right to redeem until the equity of redemption is foreclosed, and sometimes an incumbrance by mortgage will be maintained separately from the fee, even when both are united in the same person (*Howe v. Woodruff*, 12 Ind. 214), and in favor of persons, even after foreclosure, when they have not been made parties to the suit. *Cox v. Vickers*, 35 Ind. 27; *McKernan v. Neff*, 43 Ind. 503. But there is no common law right to redeem land sold on a judgment at law, when the lien is general. In this case, the appellant insists upon the right to redeem by virtue of the second clause of section 452, above cited, which enacts that the purchaser "may hold the property subject to be redeemed by the execution-defendant, his heirs or assigns, by paying to the purchaser, his heirs or assigns, the purchase-money, with interest."

But is this clause of the section in force? By the first section of the act of June 4th, 1861, 2 G. & H. 251, the owner of real property sold on execution may redeem it "at any time within one year from the date of such sale by paying to the purchaser, his heirs or assigns, or the clerk of the court from which such execution or order of sale was issued, for the use of said purchaser, his heirs or assigns, the purchase-money, with interest thereon at the rate of ten per cent. per annum." The repealing clause of the last act declares, that "all laws and parts of laws coming in conflict with any of the provisions of this act, be and the same are hereby repealed." By the second clause of section 452, the execution-defendant may redeem, without limitation as to time, by paying the purchase-money, with interest, which

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means, of course, the legal interest of six per cent. per annum. By the first section of the act of June 4th, the owner of the land may redeem, but is limited to within one year after the sale, by paying the purchase-money, with interest at the rate of ten per cent. per annum. It is plain that the two provisions are in conflict and cannot be construed together. We must, therefore, declare the second clause of section 452 of the code repealed by the act of June 4th, 1861, and give effect to the last expression of the legislative will. The appellant, not having brought his case, by the second and third paragraphs of his complaint, within the provisions of the last act, is not entitled to redeem. The court, therefore, committed no error in sustaining the demurrers to the several paragraphs of the complaint.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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**THE TOLEDO, WABASH AND WESTERN RAILWAY CO.  
v. MILLIGAN.**

**JURISDICTION.**—*Railroad.*—*Injury to Animals.*—*Action Under Statute.*—*Practice.*—In an action, under the statute, against a railroad company, to recover for the killing or injuring of animals by a passing train, the complaint should aver that the animals were killed or injured in the county where the action is brought. If such averment be omitted, the objection to the complaint may be raised by answer or by demurrer assigning want of jurisdiction, but not by demurrer assigning failure to state facts sufficient. If the question of jurisdiction be not so raised, it is not waived, but the objection may be raised by motion in arrest of judgment. The failure to prove such fact is not a ground for a motion in arrest of judgment.

**SAME.**—*Railroad.*—*Action as at Common Law.*—An action against a railroad company, based on its common law liability for negligently killing or injuring animals, is a transitory action, and may be brought in any county through which the railroad passes.

52	505
137	298
52	505
152	614

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**ARREST OF JUDGMENT.**—A motion in arrest of judgment calls in question the sufficiency of the entire complaint, and ought to be overruled if there be any good paragraph in the complaint sufficient to support the verdict or finding.

**PRACTICE.**—*Motion for Judgment on Special Findings.*—Where the special findings of a jury, in answer to interrogatories, do not embrace and cover all the issues, and are not inconsistent with a general verdict rendered for the plaintiff, as to issues not covered by them, the defendant will not be entitled to judgment thereon, though they be inconsistent with the general verdict as to the issues covered by them.

**NEGLIGENCE.**—*Railroad. — Injury to Animals.*—The owner of horses left them in a pasture adjoining a railroad which was securely fenced, and went to another state, not leaving any person to look after the horses, which went upon the railroad track, through a gate which had been recently left open by trespassers, and the horses were negligently injured by a passing train.

*Held*, that the owner of the horses was not guilty of contributory negligence.

**SAME.**—Upon the approach of the railroad train to said horses, they ran along the side of the track a long distance, and were forced upon the track by an embankment, and were driven into a bridge, and some of them were injured by the train, its speed not having been diminished, but having been increased; and the remaining horses were injured on the bridge by another train which followed in a few minutes, the engineer of which did not discover the horses until he was near them, though the conductor jumped off the train, and the fireman deserted his post, and when the signal was given there was no person to apply the brakes.

*Held*, that the railroad company was guilty of negligence.

**ASSIGNMENT OF ERROR.**—On appeal to the Supreme Court, an assignment of error that the damages are excessive is a nullity.

From the Huntington Circuit Court.

*W. Z. Stuart, J. R. Coffroth, C. B. Stuart and T. A. Stuart*, for appellant.

**BUSKIRK, J.**—This was an action by the appellee against the appellant to recover the value of certain horses alleged to have been killed and injured upon the road of the appellant.

The complaint was in three paragraphs. The first was under the statute. The second alleged that the horses were negligently killed and injured. The third is the same as the second, except it alleges that the accident occurred on Sunday.

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The appellant demurred to each paragraph of the complaint for the want of sufficient facts. The demurrers were overruled, and exceptions taken.

There were issue, trial by a jury, and verdict for the appellee.

The appellant moved in arrest of judgment, upon the ground that it was not alleged in the complaint nor proved on the trial that the animals were killed or injured in the county where the action was brought, which motion was overruled. This ruling is assigned for error, and presents for decision the first question arising in the record.

It was held in *The Indianapolis, etc., R. R. Co. v. Renner*, 17 Ind. 135, and in *The I. & C. R. R. Co. v. Wilsey*, 20 Ind. 229, that in an action under the statute to recover the value of animals killed, the complaint should aver that they were killed in the county where the action was brought, and that before the plaintiff could recover, the proof must establish such fact.

In *The I. & M. R. R. Co. v. Solomon*, 23 Ind. 534, it was held that the complaint should aver that the animals were killed in the county where the action was commenced; but it was further held, that unless the question of jurisdiction was raised by demurrer or answer, it was waived, and the two cases cited above were on this point overruled.

In *Jolly v. Ghering*, 40 Ind. 139, the above cases were cited with approval.

In *Loeb v. Mathis*, 37 Ind. 306, it was held that the question of jurisdiction was not waived by failure to raise such question by demurrer or answer, but that it might be raised by a motion in arrest of judgment.

It is firmly settled, not only by the express language of the statute, but by the above cases, that an action under the statute must be commenced in the county where the animals were killed or injured. See sec. 2, 3 Ind. Stat. 414.

According to the ruling in the cases of *The I. & C. R. R. Co. v. Renner* and *The I. & C. R. R. Co. v. Wilsey, supra*, the objection might be raised by motion for a new trial for

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a failure of proof; but according to the ruling in *The I. & M. R. R. Co. v. Solomon, supra*, the objection was waived unless raised by demurrer or answer.

The demurrer was for the want of sufficient facts, and therefore raised no question as to jurisdiction. The answer did not attempt to raise the question of jurisdiction. But according to the ruling in *Loeb v. Mathis, supra*, the question is raised by the motion in arrest of judgment.

In *The I. & M. R. R. Co. v. Solomon, supra*, a distinction is drawn between the jurisdiction of the court over the subject of the action, and the want of jurisdiction because the action is local and is brought in the wrong county, and it was held that the failure to raise the question of jurisdiction over the subject by demurrer or by answer did not waive it, but the failure to so raise the question by reason of the action being local did amount to a waiver. But in *Loeb v. Mathis, supra*, such distinction was overruled, and both classes of actions were placed upon the same ground.

The rule, as applicable to the case in judgment, may be stated thus: In an action under the statute, the complaint should aver that the animals were killed or injured in the county where the action is brought. If the complaint omits such averment, the objection may be raised by demurrer, assigning therefor want of jurisdiction, or by answer; but the failure to so raise it will not amount to a waiver, and the question may be raised by a motion in arrest of judgment or by an assignment of error in this court that the court below did not possess jurisdiction of the subject-matter of the action. If, however, the complaint contains such averment, but the fact is not proved on the trial, the remedy is not by a motion in arrest in the court below or by an assignment of error in this court. The proper remedy is by a motion for a new trial, upon the ground that the finding or verdict is not supported by sufficient evidence. It is a failure of proof, for whatever must be averred must be substantially proved.

As we have seen, the first paragraph of the complaint is

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based upon the statute, which gives a new and extraordinary remedy, and declares that the action must be commenced in the county where the animal is killed or injured. That paragraph failed to allege where the animals were killed or injured, and therefore would have been bad on demurrer.

The second and third paragraphs of the complaint proceeded upon the common law liability, and were transitory actions, and might be brought in any county through which such road passed. It is firmly settled that a motion in arrest of judgment ought to be overruled if there is a good paragraph in the complaint sufficient to support the verdict or finding. A several demurrer challenges the sufficiency of each paragraph, while a motion in arrest calls in question the sufficiency of the entire complaint. Buskirk's Prac. 172. The motion in arrest was properly overruled.

The jury returned answers to interrogatories. The appellant moved for judgment thereon, but the motion was overruled and an exception entered.

The appellant moved for a new trial. The only valid reasons assigned therefor are, that the verdict is not sustained by sufficient evidence, and is contrary to law. The motion was overruled.

The errors assigned are:

1. That the court erred in overruling the demurrers to each paragraph of the complaint.

2. That the court erred in overruling the motion in arrest of judgment.

3. That the court erred in overruling the motion for judgment on the special findings notwithstanding the general verdict.

4. That the court erred in overruling the motion for a new trial.

We have already seen that the demurrer to the first paragraph of the complaint did not raise the question of jurisdiction. In all other respects that paragraph was good. The second and third paragraphs were unquestionably good.

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We have seen that the court committed no error in overruling the motion in arrest of judgment.

The interrogatories were exclusively confined to the cause of action set out in the first paragraph of the complaint, and we think the answers thereto showed that the plaintiff was not entitled to recover upon the first paragraph of the complaint. The special findings were inconsistent with the general verdict so far as they were based upon the first paragraph, but were not inconsistent with the general verdict so far as it proceeded upon the second and third paragraphs of the complaint. The special findings do not embrace and cover all the issues in the cause, and hence do not exclude every conclusion that will authorize a recovery for the plaintiff. The motion for judgment thereon was properly overruled. Buskirk's Practice, 216, 217.

The verdict cannot be said to be contrary to law. There was no exception taken to the admission or exclusion of evidence or to the instructions given by the court. The only remaining question is whether the verdict is sustained by sufficient evidence. It is claimed by the appellant that the evidence fails to show that the appellee was without fault. We do not think so. The only fault attributed to the plaintiff is, that he left home without leaving any person on his farm to look after his horses and went to the State of Kentucky. His horses were left in the pasture. The track of the railroad was securely fenced. There were four gates between the track of the railroad and the field where the horses were pasturing. The gates were left open after 5 o'clock, P. M., by some trespassers, who passed through the gates going fishing, and the horses were injured and killed between 8 and 9 o'clock of that night. We think the plaintiff was not guilty of any negligence which contributed to the injury. Was the appellant guilty of negligence? It is shown by the evidence that two freight trains passed close together. The first train came up to four horses belonging to the appellee a half mile east of the bridge. The horses ran by the side of the track until they got within about two

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hundred yards of the bridge, when by reason of an embankment they were forced on the track, and two of them were driven into the bridge and were struck by the engine and knocked off. The engineer is chargeable with knowledge of the embankment and bridge, and instead of stopping his train or diminishing its speed, he put on additional steam and increased its speed. The second train came along in a few minutes and knocked the other horses off the bridge. There is less evidence of negligence on the part of the engineer of the second train than of the first, as he did not discover the horses until he was close upon them. But the conductor of the second train jumped off the train, and the fireman deserted his position and ran back on the train. When the engineer blew down brakes, there was no one to respond. A new trial was not asked upon the ground that the damages were excessive. It is assigned for error that they were excessive, but the assignment is a nullity. If a new trial had been asked upon that ground, it would have given the court below the opportunity of granting relief; but if the motion had been overruled, the question would have been presented for review in this court by an assignment of error that the court had erred in overruling the motion for a new trial.

In the condition of the record, we cannot examine the question of damages. There is enough evidence of negligence in the record to support the verdict.

The judgment is affirmed, with costs.

#### ON PETITION FOR A REHEARING.

BUSKIRK, J.—It is earnestly insisted by the learned counsel for appellant, in a petition for a rehearing, that we erred in holding that the failure to allege in the first paragraph of the complaint that the horses were injured and killed in the county of Huntington, where the action was brought, presented a question of the jurisdiction of the court over the subject of the action. It is claimed, in argument,

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that it was a question of fact going to make up the appellee's right to recover, and hence, was reached by a demurrer assigning an insufficiency of facts.

*Loeb v. Mathis*, 37 Ind. 306, was a local action. The complaint did not allege that the trespass complained of was committed in the county where the action was brought. The objection was not raised by demurrer or answer. But a motion in arrest of judgment was made and overruled, and this ruling was assigned for error. It was expressly held that it raised the question of whether the court possessed jurisdiction over the subject of the action. That case was decided by the late judges of this court, and a petition for a rehearing was, after full argument, overruled by the court as at present constituted.

The ruling in that case has been expressly followed in two subsequent cases. *Stanford v. Stanford*, 42 Ind. 485; *Lindsay v. Lindsay*, 47 Ind. 283. That was an action of trespass to real estate, which, under the statute, had to be commenced in the county where the land was situated. If it was a question of jurisdiction in that case, it must be a question of jurisdiction in the case in judgment, for both of the actions are local in their character. Causes of demurrer must conform to the specifications of the statute. The specifications in the statute as to grounds of demurrer are separate and independent, and the causes assigned in the demurrer should conform thereto. If the pleading to which the demurrer is addressed is not subject to demurrer for the cause assigned, it must be overruled, although it is demurrable upon other grounds. Buskirk's Practice, 180, and the numerous authorities there cited. It results that a demurrer assigning for cause a want of sufficient facts presents no question as to the jurisdiction of the court over the subject of the action.

The petition is overruled.

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Wilson *et al.* v. Dawson *et al.*

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## WILSON ET AL. v. DAWSON ET AL.

PRINCIPAL AND SURETY.—*Bank.—Deposit Under Special Agreement.*—A person, who was indebted as principal upon a promissory note to a banking firm, after the maturity thereof deposited in the bank of said firm, where said note was payable, and checked out, sums amounting to more than said indebtedness, under a special agreement between the depositor and the bank that the former should buy cattle and give the sellers checks payable or to be presented after the buyer had sold the cattle and deposited the proceeds in the bank, and that the bank should apply the money so deposited to the payment of such checks exclusively.

*Held*, that the money so deposited could not have been applied by the bank to the payment of said note, and that a surety thereon, who was not a party to said agreement, was not released by the failure of the bank to so apply said deposits.

From the Warren Circuit Court.

*H. W. Chase, J. A. Wilstach and F. S. Chase*, for appellants.

*W. C. Wilson, J. H. Adams and W. P. Rhodes*, for appellees.

DOWNEY, C. J.—The appellants, Alexander Wilson, Joseph S. Hanna and Henry H. Hanna, partners as Wilson & Hanna, sued the appellees, Henry C. Dawson, Charles J. Dawson and others.

Henry C. Dawson was indebted to Wilson & Hanna upon several promissory notes, amounting to something more than fifteen thousand dollars, on all of which, with the exception of one for twelve hundred dollars, the said Charles J. Dawson was surety. Henry C. Dawson made a mortgage to Wilson & Hanna, on certain real estate, to secure the payment of said notes, in which his wife joined. There was a mistake in the mortgage in describing a part of the real estate intended to be mortgaged. A part of the land embraced in the mortgage was afterwards released by the mortgagees from the lien of the mortgage.

The notes not having been paid at maturity, this action was brought by the appellants against Henry C. Dawson and

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*Wilson et al. v. Dawson et al.*

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wife and Charles J. Dawson, to recover judgment upon the notes, to reform the mortgage, to set aside the release of the lien of the mortgage on part of the real estate, which, it is alleged, was fraudulently obtained, and to foreclose the mortgage. The other defendants were holders of junior incumbrances on the mortgaged premises.

Charles J. Dawson, the surety, pleaded that after the maturity of the notes, which were payable at the bank of the plaintiffs, they being private bankers, Henry C. Dawson, the principal in the notes, deposited money in the bank of the plaintiffs in a sum exceeding the amount of the notes, which the plaintiffs suffered to be checked out and withdrawn by him, and he, Charles, claimed that this operated as a satisfaction and discharge of the notes so far as he was concerned.

The plaintiffs replied in several paragraphs, substantially that the said Henry C. Dawson was a dealer in cattle, etc., but had become embarrassed, and had no means to pay said notes, or to pursue such business, and that it was agreed between them and said Henry C. that he should buy cattle, etc., and give the sellers checks payable, or to be presented, after he had sold the stock, etc., and had deposited the proceeds with the plaintiffs, and that they were to apply such moneys so deposited with them to the payment of such checks exclusively; and that the money alleged by the defendant Charles to have been received and paid out by them was the money received and paid out under and in accordance with this special agreement, and no other.

The court, on demurrer to the reply, held that the same was insufficient. This ruling, to which there was an exception, and which is assigned as error, presents the question, and the only question, necessary to be decided.

Had the deposits been made by the principal in the note generally, and not under a special agreement, we need not decide whether or not the surety could have claimed that the money should have been applied to the payment of the debt for which he was liable, the debt being at the time due

and payable. But see *McDowell v. The President, etc., of The Bank of Wilmington, etc.*, 1 Harring. Del. 369; *Dawson v. The Real Estate Bank*, 5 Ark. 283; Morse on Banks & Banking, 34. It is clear, we think, however, that as the money in question was deposited under a special agreement that it should be paid out and used only in satisfaction of the checks drawn in favor of the persons from whom the cattle, etc., had been purchased, from the sale of which by the principal in the note the money had been derived, it could not have been rightfully applied to the satisfaction of the notes on which the action is predicated.

Counsel for appellee suppose there is some hardship to the surety in this rule, as under it the creditor will be allowed to part with security which he had in his hands for the debt of the principal to the injury of the surety. This argument assumes the correctness of the controverted position; that is, that the money might rightfully have been applied by the creditor, a position which we think cannot be sustained. It is a general rule, that funds deposited in a bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor. The claim of a general lien by the bank would be inconsistent with its special undertaking. Morse on Banks & Banking, 34, *et seq.*, and authorities cited; *Bank of U. S. v. Macalester*, 9 Pa. St. 475. It is evident that the surety loses nothing, for the reason that the creditor parts with no advantage in which the surety had, at any time, an interest. Had it not been for the special agreement made by the bankers, it may be presumed the money never would have been deposited with them. Counsel suppose that there was no consideration for the special agreement. But we are confident in the statement that this position cannot be sustained. The deposit of the money is the consideration for the agreement as to its application. Again, counsel urge that Charles J. Dawson, the surety, was not a party to the special agreement. We think there can be nothing in this fact, unless it

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be that it is a reason why he can make no claim under it.

Again, it is urged that the matters set up in the special paragraphs of the reply might have been given in evidence under the general denial therein, and that, for this reason, there was no available error in the action of the court in sustaining the demurrer. We are of a different opinion. It seems to us that the affirmative or special paragraphs of the reply set up new matter not properly admissible under the general denial in the reply.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Petition for a rehearing overruled.

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WILEY v. THE STATE.

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CRIMINAL LAW. — *Concealed Weapon. — Evidence. — Negative Averment. —*

Under an indictment charging the defendant with carrying a concealed weapon, he not being a traveller, it is not incumbent on the State to prove such negative, the affirmative being matter of defence.

From the Decatur Circuit Court.

*J. S. Scobey*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

BUSKIRK, J.—The appellant was convicted in the court below for carrying a concealed weapon.

The court, over a motion for a new trial, rendered judgment on the verdict. This ruling of the court is assigned for error.

It is, in the first place, contended that the verdict is not sustained by sufficient evidence, and the defect pointed out is this: that there was no evidence as to whether the appellant was or was not a traveller. The indictment alleged that he was not a traveller. If the burden of proof on this

point is upon the State, then there was a failure of proof, and the judgment must be reversed. If, on the other hand, it was a matter of defence, and the appellant failed to make the proof, he is in no condition to complain of his own omission. In 1 Wharton Crim. Law, sec. 614, the following language is used:

“Where, in a statute, an exception or proviso qualifies the description of the offence, the general rule is, as has been seen, that the indictment should negative the exception or proviso. In such cases, when the subject of the exception relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. Thus it is incumbent on the defendant, in an indictment for selling liquor by the small, to prove he is licensed. So, informations upon the game laws must negative the defendant's qualifications to kill game; but this negative need not be proved upon the part of the prosecution; on the contrary, the defendant must prove the affirmative of it as matter of defence. So, informations for selling ale without a license must negative the existence of a license, but the informer need not prove the negative. And the defendant, in an indictment for trading as a hawker and pedler without a license, must prove that he has a license.”

Bishop on Statutory Crimes, in section 1051, says:

“We have seen something of the necessity and nature of the averment, that the defendant was not authorized to make the sale. But must this negative averment, when made, be established by affirmative evidence on behalf of the prosecution? If we look at the question as one of principle, we

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perceive, that, seeing it is a part of the case presented by the prosecuting power against the defendant, it must be established, like every other part, before the defendant can be called upon to meet the charge by his counter proofs. But, in the law of evidence, not everything which a party must prove is required to be established by the testimony of witnesses. Some things are proved, *prima facie*, or even conclusively, by a presumption. One of the leading presumptions in our law is, that what is common in general belongs also to the particular; this is a *prima facie* presumption, and the party who would resist its force must show, that, in the particular instance, the fact is otherwise. Thus, while slavery existed in a part of our states, and most of those persons who had the African features and color were slaves, every negro was presumed to be a slave, and one who would take the benefit of an exception in the particular instance must prove it. But in a free state, where the fact was not generally so, yet a person might be a slave by reason of his having escaped from his master in a slave state, the presumption was reversed to accord with the general fact. In like manner, as the mass of mankind are sane, each individual man is presumed to be so, in accordance with the general fact; therefore an allegation of sanity is not to be proved otherwise than by the presumption; and he who would rely on the contrary, as pertaining to the particular instance, must show it in evidence. From this it follows, that, if the law forbids the mass of the community to sell intoxicating liquor, but grants license to some particular individuals to sell it, then, if some one person is indicted for making an unlicensed sale, the presumption that what is common in general belongs likewise to the particular stands as *prima facie* proof, and the defendant, if he has a license, must show it. This conclusion of legal reasoning is aided by the further consideration, that, since the averment is a mere negative one, and, if it is not true, the defendant has in his own possession the evidence to show the truth, the orderly and convenient administration of justice is promoted, while no

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harm is done to the individual, by casting the burden on him."

We think the exception relates to the appellant personally and is particularly within his knowledge. Besides, a majority of persons are not travellers. The presumption was, that the appellant was not a traveller, and if he desired to take himself out of the operation of the general rule, it was incumbent upon him to make the proof. We think the burden of proof was upon the appellant, and hence he can not rely upon a failure of proof.

We have read the evidence, and think it supports the verdict.

The judgment is affirmed, with costs.

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BISHPLINGHOFF ET AL. v. BAUER.

**SUPREME COURT.**—*Objection to Evidence.*—The Supreme Court will not consider the question of the admissibility of evidence admitted over objection, when it does not appear that any specific objection to such evidence was pointed out to the court below.

**SALE.**—*Refusal to Accept Goods.*—*Conversion.*—*Statute of Limitations.*—Under a contract for the sale of a quantity of wine, the vender delivered to a carrier, to be transported to the buyer, wine, which on its arrival the buyer refused to accept, because it was not of the quality contracted for, and the buyer, after corresponding with the vender, took the wine from the carrier, and stored it in his cellar, subject to the order of the vender. Said buyer died, and his successor in business sold the wine to other persons.

*Held*, that the property in the wine did not pass to said buyer, the administrator of whose estate would not be liable therefor to the vender; but said successor of the buyer was liable to said vender for the wrongful conversion.

*Held*, also, that the statute of limitations did not commence to run against said vender in favor of said successor of the buyer until the time of the conversion.

From the Marion Superior Court.

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Bishplinghoff *et al.* v. Bauer.

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*B. K. Elliott* and *A. C. Ayres*, for appellants.

*J. Klingensmith* and *C. Coulon*, for appellee.

DOWNEY, J.—Bauer sued Herman Rickhoff, Elizabeth Rickhoff, John B. Stumph and Herman Bishplinghoff, for the value of certain wine of the plaintiff, which he alleged the defendants had wrongfully converted to their own use.

The answer of Herman Rickhoff and Elizabeth Rickhoff is not in the record. Stumph and Bishplinghoff answered in two paragraphs. The first was a general denial, and the second was, that the cause of action did not accrue within six years next previous to the commencement of the action. There is no reply in the record. There was a trial by the court, a finding for the defendants Herman Rickhoff and Elizabeth Rickhoff, and for the plaintiff as against Stumph and Bishplinghoff for one hundred and seventy dollars.

The defendants Stumph and Bishplinghoff moved the court to grant them a new trial for the following reasons:

1. That the finding of the court is contrary to law.
2. That the finding of the court is contrary to the evidence.
3. The court erred in admitting the evidence of the entries of the books of Frank.
4. The finding of the court is not supported by the evidence.
5. Excessive damages.

This motion was overruled, and there was judgment according to the finding of the court. The defendants Stumph and Bishplinghoff appealed from the judgment of the special term to the general term of the superior court, and there assigned as errors:

1. In finding for the plaintiff and rendering judgment against them for one hundred and seventy dollars.
2. In overruling their motion for a new trial.
3. In admitting evidence of entries in the books of A. Frank.

The judgment at special term was affirmed in the gen-

eral term, and the defendants Stumph and Bishplinghoff appealed to this court.

It is here assigned as error that the general term erred in affirming the judgment at special term.

So far as the first and third assignments of error in the general term are concerned, we need not consider them, as they are merely reasons for a new trial, and not proper assignments of error.

The second assignment of error in the general term, that is, the overruling of the motion for a new trial, brought before the general term all questions properly in the motion for a new trial, and the assignment in this court of error upon the affirmance of the judgment of the special term by the general term brings before us for consideration the same questions that were before the general term.

The first question made by counsel for the appellant is upon the admission in evidence of the entry in the book of one Frank, to whom the wine was shipped by the plaintiff. We do not find that any specific objection to this evidence was pointed out. This was necessary to present any question on appeal. If this rule were not adhered to, one objection might be urged in the trial court, and a different one here, and thus we should be required to decide a question which had not been presented to or decided by the court below. We cannot, therefore, consider the question.

The plaintiff had contracted to sell the wine in question to Frank, and it was shipped, under the contract, by the plaintiff, from Sandusky, Ohio, to Frank, at Indianapolis. Frank had refused to accept the wine, when it arrived at Indianapolis, for the reason that it was not of the quality agreed upon in the contract. Frank, after corresponding with the plaintiff, took the wine from the railroad depot, and stored it in his cellar, subject to the order of the plaintiff. In this condition of affairs, Frank died, and the defendants Stumph and Bishplinghoff succeeded him in business, and in that way came into possession of the wine, which, the evidence tends to show, they sold to other parties. Herman

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Rickhoff married the widow of Frank, and thus he became a party to the action, with her.

It is urged that when the wine was shipped at Sandusky to Frank, at Indianapolis, the property in it passed to Frank, and that the plaintiff's claim is against Frank's estate, and not against the defendants Stumph and Bishplinghoff.

We cannot say that the finding of the court was erroneous on this point. Frank never received the wine under the contract. Had the wine corresponded with that purchased, it may be that the position of the counsel for the appellants would be correct. We think it cannot be held that the delivery, by the vender to a carrier, to be transported to the vendee, of goods different from those contracted for, will, despite the refusal of the purchaser to receive them, vest the ownership of them in the purchaser.

It is submitted that, at all events, the cause of action was barred by the statute of limitations. This claim is predicated on the theory that the plaintiff's cause of action accrued when he shipped the wine from Sandusky. If we are right in the views already expressed, this position cannot be sustained. As to the cause of action against Stumph and Bishplinghoff, the position cannot be sustained, for the additional reason that they converted the wine to their use, by selling the same, after the death of Frank, and within six years before the commencement of the action.

The judgment is affirmed, with five per cent. damages and costs.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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### BURKE v. THE STATE.

**LIQUOR LAW.—*Indictment.***—An indictment under section 12 of the liquor law of 1875 (Acts 1875, Spec. Sess. 55) charged that the defendant "did then and there unlawfully sell to" a person named "one gill of intoxicating liquor, for" a sum of money stated, "to be drank upon the prem-

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ises," the defendant "not then and there having a license to sell intoxicating liquors to be drank upon the premises," without alleging that the defendant had not a license to sell intoxicating liquors in a less quantity than a quart at a time, and without other or more particular designation of the place of drinking in the affirmative allegation and the negative averment as to the want of license.

*Held*, that the indictment was bad on motion to quash.

From the Henry Circuit Court.

*D. W. Chambers* and *E. Saint*, for appellant.

*C. A. Buskirk*, Attorney General, and *R. D. Doyle*, for the State.

BUSKIRK, J.—The appellant was convicted in the court below for selling liquor without a license.

The first error calls in question the action of the court in overruling a motion to quash the indictment. The objection urged to the indictment is, that it does not sufficiently allege that the appellant sold without a license. The negation is in these words: "the said Burke not then and there having a license to sell intoxicating liquors to be drank upon the premises."

It is claimed that the negation should have been in one or the other of the following forms: "the said Burke not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time;" or, "the said Burke not then and there having a license to sell intoxicating liquors to be drank or suffered to be drank in his house, out-house, yard, or appurtenances thereto belonging."

It is contended, in argument, that, as there is no definition of the word "premises" in the present liquor law, the indictment should have followed the language of the statute defining the offence.

It is next insisted that the indictment is bad, because it does not aver that the liquor was drank or suffered to be drank on the premises of the appellant. The averment is, "did then and there unlawfully sell to Scott Toby one gill of intoxicating liquor, at and for the sum of ten cents, to be drank upon the premises."

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The 12th section of the act of March 17th, 1875, is as follows:

“Any person not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spiritous, vinous or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spiritous, vinous or malt liquors to be drank or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor,” etc.

Two separate and distinct offences are created by the above section. The one for selling, without a license, any of the kinds of liquor specified, in a less quantity than a quart at a time; the other for selling, without license, any of said kinds of liquor, in any quantity, to be drank or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging. In the first case, an averment that the liquor was sold, without a license, in a less quantity than a quart at a time, will be sufficient, if the quantity sold is stated. In the other case, an averment that any quantity of liquor was sold without a license, to be drank or which was suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, will be sufficient.

In an indictment for selling in a less quantity than a quart at a time, without a license, there should be no reference, either in the body of the indictment or in the negative averments, to the place where the liquor was sold or where it was drank. Under the second clause of section 12, *supra*, the place where the liquor was sold to be drank, or was suffered to be drank, becomes important. There are five places specified:

1. His house.
2. His out-house.
3. His yard.
4. His garden.
5. The appurtenances thereto belonging.

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If the liquor is sold to be drank, or is suffered to be drank, in his house, the indictment should so aver, and so with each of the other places named. The averment as to where the liquor was sold to be drank, or was suffered to be drank, should conform to the fact in each particular case. The negation need not be in the exact language of the statute, but equivalent words may be used. *The State v. Buckner, ante*, p. 278. In the present case the negation should have been as follows:

“The said Burke not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time.”

The negation in an indictment based upon the second clause of said section should conform to the charge made, and may be in one of the following forms:

“The said ——— not then and there having a license to sell intoxicating liquor, to be drank, or suffered to be drank, in his house.”

If the liquor was sold to be drank, or was suffered to be drank, in his out-house, then that word should be used instead of the word “house;” and so the words “yard,” “garden,” or “appurtenances thereto belonging,” should be used whenever such word is used in the charging part of the indictment.

The ruling in *Burke v. The State, ante*, p. 461, was based upon the ground that it did not appear from the indictment whether the liquor was sold to be drank, or was suffered to be drank, in the house of the defendant, or in the house of some other person, and does not conflict with the ruling in the present case.

The negation in the present case does not conform to the language of the statute or use equivalent words. The indictment is for selling liquor in a less quantity than a quart at a time. The negation should relate to the question whether the defendant was licensed to sell by a less quantity than a quart at a time, and not to whether he was

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licensed to sell liquors to be drank, or suffered to be drank, in one of the five cases above specified.

The court erred in overruling the motion to quash the indictment.

The judgment is reversed, with costs; and the cause is remanded, with direction to the court below to quash the indictment.

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### OSBORN v. THE STATE.

**CRIMINAL LAW.—Indictment.—Abduction of Female for Purpose of Prostitution.**

An indictment charging the defendant with the abduction of a female “for the purpose of having illicit sexual intercourse with her” does not charge an abduction of a female “for the purpose of prostitution,” within the meaning of the statute, 2 G. & H. 441, sec. 16.

From the Franklin Circuit Court.

*H. Berry, F. Berry and W. H. Bracken*, for appellant.

*C. A. Buskirk*, Attorney General, for the State.

WORDEN, J.—The appellant was tried, convicted and sent to the state prison upon the following indictment, its sufficiency having been properly questioned, viz.:

“The grand jurors,” etc., “in the name and by the authority of the State of Indiana, upon their oath present and charge that on or about the 15th day of January, A. D. 1875, at and in the county of Franklin and State of Indiana, one James T. Osborn unlawfully and feloniously enticed away one Alvaretus Faurote, a female of previously chaste character, from said county of Franklin, in the State of Indiana, to the city of Jeffersonville, in the county of Clarke, in said State of Indiana, for the purpose of having illicit sexual intercourse with her, the said Alvaretus Faurote, contrary to the form of the statute,” etc.

The indictment is based upon the following statutory provision, viz.:

"If any person shall entice or take away any female of previous chaste character, from wherever she may be, to a house of ill fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall be imprisoned in the state prison not less than two nor more than five years, or may be imprisoned in the county jail not exceeding one year, and be fined not exceeding five hundred dollars; but in such case the testimony of such female shall not be sufficient unless supported by other evidence, corroborating to the same extent as is required in cases of perjury as to the principal witness." 2 G. & H. 441, sec. 16.

It will be seen by the indictment that the appellant is charged with having abducted the female "for the purpose of having illicit sexual intercourse with her," and not "for the purpose of prostitution," as is provided for by the statute. The question arises whether the facts charged come within the statute. We are of opinion, upon an examination of the authorities, that they do not.

The first case to which our attention has been called is that of *Commonwealth v. Cook*, 12 Met. 93. There Cook was indicted under a statute quite similar to our own. The court say, in speaking of the point here involved (p. 98): "The court are of opinion, that the offence made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view, and for the purpose, of placing her in a house of ill fame, place of assignation, or elsewhere, to become a prostitute, in the more full and exact sense of that term; that she must be placed there for common and indiscriminate sexual intercourse with men; or, at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her; and that a mere enticing away of a female, for a personal sexual inter-

course, will not subject the offender to the penalties of this statute."

The next case is that of *Carpenter v. The People*, 8 Barb. 603. In that case, Carpenter was prosecuted under a similar statute, and the court came to the same conclusion as that arrived at in Massachusetts, though the Massachusetts case is not therein mentioned. The court say (p. 611):

"We are entirely clear that by the expression in question" (prostitution), "as used in the statute, it was intended that in order to constitute the offence thereby created, the abduction of the female must be for the purpose of her indiscriminate, meretricious commerce with men. That such must be the case to make her a prostitute, or her conduct prostitution, within the act."

Following these cases is that of *The State v. Ruhl*, 8 Iowa, 447. The latter was also a prosecution, under a similar statute, for enticing away a female for the purpose of prostitution. There was evidence of a purpose on the part of the defendant "to seduce and enjoy the body of the said Matilda" (the female), "and that he had taken her away, in order to have carnal intercourse with her, and did so enjoy her person; but there was no testimony that he proposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or purposed taking her, to any house of prostitution." On these facts the defendant asked the following instruction, which was refused, viz.:

"If the defendant only intended to obtain the body of the said Matilda, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law."

It was held that the charge should have been given, that the word "prostitution" means common, indiscriminate, illicit intercourse, and not sexual intercourse confined exclusively to one man. To the same effect is the still later case of *State v. Stoyell*, 54 Maine, 24.

In view of these authorities, we think it clear that the

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indictment does not charge the abduction of the female "for the purpose of prostitution," within the meaning of the statute.

The judgment below is reversed, and the cause remanded, with instructions to the court below to sustain the motion to quash the indictment.

The clerk will give the proper notice for the return of the prisoner.

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### HELTON v. MARTIN.

**STATUTE OF LIMITATIONS.**—*Recovery of Possession of Real Estate.*—To a complaint for the recovery of the possession of real estate on the ground that a deed of conveyance thereof, executed by the plaintiff to the defendant, was intended as a mortgage, and that the debt secured thereby has been paid, an answer of the statute of limitation of six years is bad.

**BILL OF EXCEPTIONS.**—*Filing.*—Where time has been given in which to file a bill of exceptions, the record must show that it was filed in time.

**AME.**—*Evidence.*—*Instructions to Jury.*—Where the evidence is not properly in the record, the Supreme Court will not consider the evidence, or instructions given to the jury with reference to the evidence, unless they are injurious to the party complaining of them under any state of the evidence admissible.

From the Morgan Circuit Court.

*S. Claypool, J. L. Mitchell, W. A. Ketcham, J. C. Robinson, F. P. A. Phelps, M. H. Parks and A. M. Cuning,* for appellant.

*W. R. Harrison and W. S. Shirley,* for appellee.

**PETTIT, J.**—This suit was brought by the appellee, John Martin, and Melissa Martin, his wife, against the appellant, Wallace W. Helton, for the possession of lands and damages for the use and occupation thereof. The complaint was in four paragraphs.

The first was in the usual and proper form in such actions.

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The second was struck out on motion, and no question is raised as to it.

The third and fourth are, to and in all legal intent and purpose, substantially alike, and allege that the plaintiffs, in form, deeded the lands to the defendant, but that the deed was in fact a mortgage to secure the defendant in and for the payment of some debts of the plaintiff John Martin, and that the use and occupation, rents and profits received by the defendant largely exceeded the debts which he was to and had paid, and asking that the deed in form should be decreed to be a mortgage, and that it be decreed satisfied, for possession of the lands, and for judgment for the amount or value of the rents over and above the debts of the plaintiff John, paid by the defendant. In these paragraphs there are allegations of fraud, deception, influence, cunning and shrewdness on the part of the defendant, and of youth and weakness of mind on the part of the plaintiff John; but we do not think that they in any manner affect or change the substance or purpose of these paragraphs of the complaint. By consent, the wife had a decree in her favor and judgment for costs, and thus went out of the case.

The defendant answered in two paragraphs:

1. General denial.
2. As to the fourth paragraph of the complaint, that the cause of action arose more than six years before the commencement of the action.

To the second paragraph of the answer there was a reply in two paragraphs:

1. A general denial.
2. Concealment of the facts.

To the second paragraph of the reply there was a demurrer, for want of sufficient facts, overruled, and we hold correctly. No matter whether good or bad in itself, it was good enough for a bad answer. In such a case as this, a plea of the statute of limitation of six years is not good. *Vanduyne v. Hepner*, 45 Ind. 589-598.

Another reason why there was no error in overruling the

demurrer to the second paragraph of the reply, which was to the second paragraph of the answer pleaded to the fourth paragraph of the complaint only, is, that the third paragraph of the complaint was, in substance, the same as the fourth, and all evidence that could be given under one could be given under the other; and therefore, if the answer was good as to the fourth paragraph of the complaint, there could be no reason for a reversal on account of the overruling of the demurrer to the reply.

It is claimed that the evidence is not sufficient to sustain the verdict, and that the instructions given thereon are erroneous.

At the rendition of the judgment, thirty days were given in which to file bills of exceptions. The record does not show that the bill of exceptions containing the evidence was filed in time, or that it was ever filed. We can not, therefore, consider the evidence or the instructions given on or with reference to it, if they were not injurious to the defendant in any state of the evidence that might have been given, which is not the case here.

The judgment is affirmed, at the costs of the appellant, with five per cent. damages.

BUSKIRK, J., having been engaged in a cause involving the same interests, between the same parties, was absent.

Petition for a rehearing overruled.

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KASTER ET AL. v. KASTER ET AL.

WILL. — *Lost or Destroyed Will. — Concealed Will. — Practice. — Pleading.*—

Assuming that the circuit court has jurisdiction, under proper circumstances, to establish a will which has been duly executed, but afterwards lost or destroyed, yet a complaint to establish a will which did not allege that the will had been lost or that it had been destroyed, but alleged that, after the testator's death, the defendant got access to his papers and

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there found the will and got it into his possession and "concealed and suppressed *or* destroyed the same," was held insufficient on demurrer, it not being certain from its averments that the will was not in existence and could not be brought before the court to be proved by a citation under sections 25 and 26, 2 G. & H. 556.

From the Shelby Circuit Court.

*S. Major* and *C. Wright*, for appellants.

*B. F. Love*, *B. F. Davis* and *R. A. Black*, for appellees.

DOWNEY, J. — Action by the appellees against the appellants, commenced on the 18th day of April, 1871. The appellants, with two exceptions, and also the appellees, are heirs at law of Benjamin Kaster, deceased.

It is alleged in the complaint that the deceased died on the 10th day of January, 1857, testate, in Shelby county, in this State, the owner of several tracts of land, which are particularly described in the complaint, and also personal estate. It is stated that the deceased left a widow, but that she had departed this life before the commencement of this action. It is further alleged, that after the death of said Benjamin Kaster, partition of said real estate was made among said widow and heirs; but the exact date when this occurred does not appear. The complaint states particularly the part of the real estate which was set off to each of the parties.

It is then alleged that some time before the death of said Benjamin Kaster, he made his last will and testament, signed by him, and attested and subscribed in his presence by Joseph Cummins and William H. Bainbridge, competent witnesses, and that the deceased was then competent to devise his property, and not under coercion.

The complaint then proceeds as follows:

"Said will specified and provided, after the decease of said testator, Benjamin Kaster, that, out of the effects of the estate of said testator, one hundred dollars should be paid to the defendant William Kaster, and one hundred dollars to each of the following named persons, to wit: to said Albert Vanvost, Ann Eliza Vanvost and Catharine Vanvost, but

since intermarried with, and now the wife of, the above named defendant Jackson Irving, to be paid out of the effects of the estate of said testator after his decease; and that all the residue of the estate, real and personal, of said testator, that he should own after his decease, should be used and enjoyed by his widow, Priscilla Kaster, for and during the term of her natural life, and at her death to go to and be owned by and be equally divided between the plaintiffs, James Kaster and Lewis Kaster, as the absolute and unqualified owners thereof; the above being substantially the provisions, devises and bequests in said will contained, and being substantially the whole contents thereof."

It is averred that the deceased died, leaving said will in full force; that, after his decease, William Kaster and John Kaster, two of the defendants, "got access to the papers of the testator, and there found and discovered said will, and got the same into their possession, and concealed and suppressed or destroyed the same."

It is also alleged that administration of the personal estate was granted, and the same was finally settled, in ignorance of the existence and suppression of the will.

It is further stated, that at the time of the death of said Benjamin Kaster, at the time of the appointment of the administrator, at the time of the partition of the lands, and at and ever since the death of said testator, they were wholly ignorant of the facts that said testator had made said will and of the existence thereof, or that they had any interest in said lands, except by descent; and they charge that said William Kaster and John Kaster fraudulently concealed said will and the existence thereof from the plaintiffs.

It is then alleged that John Kaster sold and conveyed to the defendant Michael Billman forty-seven acres of the land set off to him in the partition, and that another of the defendants conveyed his share to one Lewis Burkher, and that Billman and Burkher knew of the will and of the plaintiffs' rights under the same.

The complaint further states, that at the time of the death

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of said Benjamin Kaster, at the time of the settlement of his estate, and at the time of the partition of said lands, the plaintiffs, and each of them, were infants under twenty-one years of age.

Prayer, that the will be established and probated, and that the order for partition be set aside, and said conveyances set aside, and for all other proper relief.

The sufficiency of the complaint was brought in question by a demurrer thereto, alleging that it did not state facts sufficient to constitute a cause of action. The court adjudged it sufficient, and overruled the demurrer. There was an exception to this ruling of the court, and it is assigned as error. No objection is made to the complaint on the ground that it should have been filed as a complaint to review the judgment in the partition suit, and we decide nothing on that point. We assume that jurisdiction exists in the circuit court to entertain a complaint, under proper circumstances, to establish a will which has been duly executed, but afterwards lost or destroyed. The statute apparently recognizes the existence of the jurisdiction. 2 G. & H. 561, sec. 51, and p. 562, sec. 53. Another part of the same act, 2 G. & H. 556, secs. 25 and 26, gives the court power and authority to issue a citation to any person, alleged to have the custody of any will, requiring him to produce the same before the court, that it may be proved, and the court is authorized to imprison such person if he refuse, etc. These portions of the act evidently contemplate a different state of facts and a different mode of proceeding from those required in an action to establish a will which has been lost or destroyed.

The complaint in the case under consideration was intended as a complaint to establish a will which had been lost or destroyed. Hence the question is, does it, by its averments, make a case entitling the party to such relief? We think it does not. It does not show that the alleged will, which it seeks to have established, was either lost or destroyed. It should allege one or the other, in order to be

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sufficient. What it avers is, that the defendants "got access to the papers of the testator, and there found and discovered said will, and got the same into their possession, and concealed and suppressed or destroyed the same." In a proceeding requiring so much certainty of allegation and clearness of proof as is required in this proceeding, this allegation must be held insufficient. It is not certain, under the allegation, that the will is not in existence and can not be got before the court and proved in the other mode of proceeding contemplated by the statute.

For this defect in the complaint, the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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 TRACY ET AL. v. KELLEY.

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**RESULTING TRUST.**—*Husband and Wife.*—Where a husband fraudulently takes a conveyance of land in his own name, the consideration having been paid by his wife, a trust thereby results in the wife's favor. This rule is not changed by the statute, 1 G. & H. 651, secs. 6, 8.

**PLEADING.**—*Action to Recover Possession of Real Estate.*—In an action for the recovery of the possession of real estate, under an answer of general denial, all defences and all matters of reply may be given in evidence.

**WITNESS.**—*Wife.*—Action against a widow to recover from her the possession of land, the title of which had been fraudulently taken by her deceased husband in his own name, she having paid the consideration, the plaintiff claiming under a sale by the sheriff on execution against the husband.

*Held*, that she was a competent witness to testify as to all matters touching her own rights in said land.

From the Ripley Circuit Court.

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Tracy *et al.* v. Kelley.

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*E. P. Ferris, S. A. Huff, J. W. Nichol and B. G. Birney,*  
for appellants.

*S. M. Jones and H. W. Harrington,* for appellee.

BIDDLE, C. J.—Suit to recover the possession of land. No question is made upon the complaint. The first paragraph of answer was a general denial, and the second was as follows:

That on the 28th day of September, 1826, the defendant was married in Warren county, in the State of Ohio, to Thomas J. Kelley, who died in 1873; that after said marriage, her brother, John R. Ritchey, by his will, bequeathed to her eight hundred and thirty-three dollars, for the purpose of purchasing her a home, in her own right, and taking the deed in her name; that after the death of her brother, his executor, William Ritchey, in the year 1845, paid her the said eight hundred and thirty-three dollars; that soon after she received the money, she placed it in the hands of Thomas J. Kelley, her husband, for the purpose of purchasing a home for her in the State of Indiana, in her own right, and to take the deed in her name; and that her husband soon after purchased the land described in the complaint; that at the time said purchase was made, she and her husband resided in the State of Ohio; that soon after said purchase, they removed to Ripley county, Indiana, and settled upon said land, where they continued to reside up to the time of his death; that she has been in possession of said land from the year 1846 to the present time; that after said purchase, her husband informed her that said land was purchased in her own right with the money aforesaid; that she so resided on the land until 1870, when she learned for the first time that the title of said land was made to Thomas J. Kelley; that she cannot read or write; that she had full confidence in her husband, believing that she had the full title to said land; that said Thomas, fraudulently and without her knowledge or consent, had the deeds to the land made to himself, and that he purposely and knowingly concealed the same from this defendant; that upon learning

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that the title to the land was in Thomas, she commenced proceedings in the Ripley Circuit Court against the said Thomas J. Kelley, to quiet the title to said land in herself, as appears of record, and that said title was so quieted in this defendant; that the plaintiffs claim title to said land by virtue of a sheriff's sale made upon a judgment in their favor, and against said Thomas, upon notes executed to them by him, which judgment was rendered in the — Court of Ripley county, Indiana; wherefore she asks that the title to said land may be quieted in her as against said plaintiffs, and for other relief.

A demurrer, alleging a want of facts as cause, was overruled to the second paragraph of answer, and exception taken.

Reply: 1. General denial.

2, 3, 4, 5 and 6. Statute of limitations.

7. Setting up a judgment recovered by plaintiffs against Thomas J. Kelley in the Ripley Circuit Court, in 1868, for one thousand three hundred dollars, execution, levy, sale, and sheriff's deed to plaintiffs for the land described in the complaint.

A motion to strike out paragraph 7 of reply was overruled. Demurrers were then filed to each paragraph of reply for want of facts, and sustained. Exceptions taken. A jury trial was had, and a verdict found for defendant, with a finding on two special interrogatories, that the money to purchase the land in controversy was received by Thomas J. Kelley from Nancy G. Kelley, and received upon the condition that he would buy land with it and take the title in her name. Judgment, over a motion for a new trial and exception, was rendered on the verdict, quieting the title in Nancy G. Kelley, and for costs. Appeal.

The first error complained of by the appellant is overruling the demurrer to the second paragraph of answer, which is also pleaded by way of cross complaint. We can perceive no error in this ruling. If a husband fraudulently takes a conveyance of land in his own name, the considera-

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tion having been paid by his wife, a trust thereby results in the wife's favor. The statute (1 G. & H. 651, secs. 6, 8) does not change this equitable rule. This court has repeatedly recognized this principle under the code. *Totten v. McManus*, 5 Ind. 407; *Resor v. Resor*, 9 Ind. 347; *Standford v. Devol*, 21 Ind. 404; *Wynn v. Sharer*, 23 Ind. 573; *McDonald v. McDonald*, 24 Ind. 68; *Noble v. Morris*, 24 Ind. 478; *Malady v. McEnary*, 30 Ind. 273; *Brannon v. May*, 42 Ind. 92.

The case of *Miller v. Blackburn*, 14 Ind. 62, upon which the appellant relies, was overruled in *McDonald v. McDonald*, *supra*.

Perhaps it is not necessary that we should decide the question raised by demurrer to the second paragraph of the answer, as all the evidence given in the case could have been introduced under the general denial to the complaint; but we think this demurrer raises the question of law governing the case, and therefore think proper to decide it. Nor is it necessary to decide the demurrers to the replies, for the same reason; for, whatever the decision might have been, no available error could have intervened, where the case was tried on the issue formed by the general denial to the complaint, as all defences and all matters in reply might be given under that answer.

The appellee was allowed to testify in her own behalf, and the question as to her competency as a witness is properly raised in this court. We think she was competent to testify as to all matters touching her own rights in the lands in controversy. *Crane v. Buchanan*, 29 Ind. 570.

Exceptions were taken to instructions numbered 2, 3, 4 and 5, given by the court to the jury.

Instruction 2 was, in substance, that if the appellee proved the facts set up in the second paragraph of her answer, she was entitled to a verdict in her favor.

3. That fraud is never presumed, but must be proved, applying the principle to the alleged trust averred in the second paragraph of answer.

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4. That in determining whether the trust existed or not, the jury should "take into consideration all the facts and circumstances bearing upon the question."

No. 5 is not essentially different from 2, the principle of which we think is settled by the ruling on the demurrer to the second paragraph of the answer.

It is insisted that the court erred in refusing certain instructions asked by the appellants, but we do not closely scan them, as, from the view we take of the case, there can be no available error in this ruling. *Musselman v. Pratt*, 44 Ind. 126.

The evidence is all before us. The plaintiffs claim under a judgment in their favor against Thomas J. Kelley, rendered February 25th, 1868, in the Ripley Circuit Court, execution thereon, levy upon, and sale of, and sheriff's deed to them of, the lands in question. This sale conveys no greater right to the plaintiffs than was in Kelley at the time. 2 G. & H. 250, sec. 472. If the interest of Mrs. Kelley in the land existed at that time, it remained in it after the sale.

The appellee introduced evidence which we think fairly proves the original trust set out in the second paragraph of her answer, and also a decree of the Ripley Circuit Court, rendered September 5th, 1871, quieting the title of said lands in her as against Thomas J. Kelley. The whole evidence, taken together, sustains, in our opinion, both the general verdict and the special findings, and in view of the whole record, we think the judgment is right.

The judgment is affirmed, with costs.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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THE OHIO AND MISSISSIPPI RAILWAY CO. v. APPLE-  
WHITE.

RAILROAD.—*Diligence of Passenger.*—It is the duty of a person about to take passage on a railway train to inform himself when, where and how he can go or stop, according to the regulations of the railway company; and if he make a mistake, not induced by the company, against which ordinary diligence would have protected him, he has no remedy for the consequences against the company.

SAME.—*Refusal to Stop Train Contrary to Regulations.*—Where a person who had purchased of a railroad company a ticket for passage to a certain station, by his own fault or mistake, got upon a train which, by the regulations of the company, did not stop at that station, he could not recover damages of the company for the refusal and failure of the conductor to stop the train and let him off at said station.

From the Washington Circuit Court.

*H. P. Buxton, E. C. Devore and C. A. Beecher*, for appellant.

*B. H. Burrell*, for appellee.

DOWNEY, C. J.—Action by the appellee against the appellant. It was commenced in Jackson county, and the venue changed to Washington county.

The complaint alleges that on March 20th, 1873, appellant received appellee on one of its passenger trains, to be carried from Brownstown to North Vernon and back again to Brownstown, for one dollar and fifty cents, which sum appellee paid; that while appellee was a passenger, returning to Brownstown, in a passenger car, and after he had delivered his ticket to the conductor on said train, appellant wilfully failed, neglected and refused to stop said train at Brownstown a sufficient length of time to let him get off at Brownstown, although requested so to do, but wrongfully, wilfully and unlawfully carried him past said Brownstown to Vincennes, a distance of ninety-six miles from his home and place of destination, against his will, and there permitted him to get off said cars, at a late hour in the night, in a strange place, and among strangers, and, on account of the gross neglect of appellant in the premises, compelled him to

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pay hotel bill, one dollar and fifty cents, and three dollars and eighty cents fare from Vincennes to Brownstown, and caused him to lose one day's time and to stay up the greater part of the night, by reason of said wrongful and unlawful acts of appellant, to plaintiff's damage five hundred dollars.

A demurrer to this complaint was filed, which was overruled by the court.

The defendant answered by a general denial and four special paragraphs. The special paragraphs were, on motion of the plaintiff, struck out by the court.

There was a trial by jury, and a verdict for the plaintiff, on which, after overruling a motion of the defendant for a new trial, there was final judgment.

The appellee has moved to dismiss the appeal for various reasons, and among them for defects in the clerk's certificate to the transcript. Under a rule of the court, we have granted leave to have the certificate amended, and that objection has been avoided by making the necessary amendment. Other grounds of the motion relate to matters which are not reasons for dismissing the appeal.

Among the errors assigned by the appellant is, that the court erred in overruling the demurrer to the complaint. This alleged error is not argued or urged, and perhaps has no good foundation. The complaint seems to us to be sufficient.

It is assigned as error, that the court improperly struck out the second, third, fourth and fifth paragraphs of the answer. But neither is this objection urged. It could not be, in fact, for there is no bill of exceptions reserving the question.

Under the error assigned relating to the motion for a new trial several questions arise, only a part of which need be examined.

We give the evidence of the plaintiff and that of the conductor on behalf of the defendant. We do this as the readiest mode of getting into the opinion the most material facts

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of the case. There is other testimony in the record on each side.

Appellee testified: "On March 20th, 1873, W. Scott Wilkerson bought two tickets for passage on appellant's railroad from Brownstown to North Vernon and return—one for himself and one for me. We got on the mail train at Brownstown, at about 5:30 P. M., and arrived at North Vernon about 7 P. M., same evening. The conductor, as we went up, took up the portion of each ticket to North Vernon, and handed back the return portion. We got on the train at North Vernon, bound west, about 2 A. M., to return to Brownstown, and when the conductor, Fields, came for our tickets, Wilkerson handed him the return portion of our tickets. When he took them, he said, 'How do you expect to get to Brownstown?' Wilkerson replied, 'By the way of the O. & M.' That was all the conversation we had with him at that time. The next time I saw the conductor was at Medora, eight miles west of Brownstown. From the point where the conductor took up our tickets to Medora was about thirty-five miles. The train did not stop at Brownstown. Medora was the first place the train stopped after leaving Brownstown. When Mr. Wilkerson handed our tickets to the conductor, he seemed to be mad because we wanted him to stop at Brownstown. I judged so from the manner in which he asked the question, 'How do you expect to get to Brownstown?' At Medora the conductor said to me, 'You had better get off here.' I went to the door of the car and asked him, 'What place is this?' He then said, 'Medora.' I said to him, 'I guess I won't get off here.' He said, 'I will see if you don't.' I said, 'You can put us off, but we do not intend to get off.' The conductor did not seem to like it because we would not get off. When we said we would not get off, he said he would see if we did not get off at Scottville or Tunnelton. I did not get off at Medora. The fare from Brownstown to Medora is thirty-five or forty cents. We got to Medora about 3 o'clock A. M. The conductor did not propose to

send us back from Medora to Brownstown. There was no train standing on the switch at Medora that I saw. The train bound east passed us while we were there on the side-track. The conductor gave us no notice that there was a train at Medora on which we could return to Brownstown. He did not tell us when we could get back from Medora to Brownstown. I think the train did not stop again until we got to Mitchell. At Mitchell the conductor did not request us to get off, or inform us when we could get back. We did not ask him to let us off at any place. After we passed Mitchell, the conductor said, 'Well, boys, you can go as far as I do.' I answered, 'Well, that is as far as we want to go.' We continued on the train to Vincennes, which is ninety-five or one hundred miles west of Brownstown. In the conversation just after we passed Mitchell, the conductor asked us how we expected to get back. I said, we intended to come back with him. He replied, 'Well, if you do, you will have to pay your fare.' At or near Washington, he asked us if we were looking for a location. We said, 'Yes.' Something was then said about a 'free ride,' and that we might as well look at the country now as any time. This was the last conversation. We got off the train at Vincennes, and were compelled to remain there until 2 or 3 P. M., when we got on the mail train and paid our fare to Brownstown, which was three dollars and eighty cents each. We got breakfast and dinner at Vincennes, which cost us one dollar and fifty cents each. I saw Mr. Fields, the conductor, as we were leaving Vincennes, standing in the door of the Junction Hotel. He bowed to me and I to him. We arrived at Brownstown about 6 P. M., the same day. At that time I was acting deputy auditor of Jackson county. I lost one day. My time was worth two dollars. I was kept up the greater part of the night. I did not get on the train at North Vernon till 2 A. M. All the stations I have spoken of are on the Ohio and Mississippi Railway. I know R. H. Sawyer, appellant's agent at Brownstown. I never told him that the conductor told us to get off at Seymour. I never

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told him, in the presence of R. J. C. Smith, that I had an arrangement with the superintendent to stop the train at Brownstown. Sometimes, before the 20th of March, I went to Seymour once or twice a week. I did not travel over appellant's railroad as often as once a week. I was conversant with mail train east and No. 3 west. I did not know that No. 4 east and No. 5 west did not stop at Brownstown. I got off the train at Seymour, and went into the Harvey House. The train remained at Seymour about five minutes. The train stopped at Medora four or five minutes. I made no effort to get off at Medora or Mitchell. Did not want to get off."

A. F. Field's deposition: "I was conductor on appellant's railroad March 20th, 1873. I know appellee and Wilkerson when I see them. They got on passenger express train No. 5, going west, about that time, at North Vernon. After leaving North Vernon I went to them for their fare. They were sitting in a seat together. They each handed me the return section of a round trip ticket from Brownstown to North Vernon and return. I told them that the train did not stop at Brownstown; that we had a meeting point to make at Medora, and would lose our meeting place if we stopped, and that Brownstown was not a stopping place for that train. I then offered them their tickets back, telling them to go on some other train from Seymour that stopped at Brownstown. They refused to take back their tickets—said they proposed to go to Brownstown on that train. The train stopped at Seymour about five minutes, it being a regular stop for that train. After leaving Seymour, I noticed that they were still on the train, but said nothing to them till after the train arrived at Medora, that being the meeting point for express train east and No. 5. There I requested them to get off, which they refused to do. They further said that I dare not put them off. The train proceeded, and stopped at Mitchell, Shoals, Loogootee, Washington, Wheatland, and Vincennes, at which point my control of the train ceased, and I got off, and they got off also.

We arrived at Vincennes at 6:30 A. M. We stopped at Medora about seven minutes, at Mitchell about five minutes, at Shoals, Loogootee and Wheatland about one minute each, and at Washington about three minutes. The points named were regular stopping places for said train, and at those places there were regular platforms and conveniences for safely getting off and on trains. We arrived at Seymour at about 2:30 A. M. If they had got off at Seymour, they could have taken a freight accommodation, which left at about 4 A. M., and got to Brownstown about 4:40 A. M., and which stopped at both points. They made no request to stop at any point between Seymour and Vincennes, and they paid no fare, and did not offer to pay any, between Brownstown and Vincennes, and I did not ask any. They seemed to be under the influence of liquor, and inclined to be drowsy and sleepy, but were not boisterous. No. 5, being an express train, had but one regular stop between Seymour and Mitchell, a distance of forty miles, that point being Medora, the meeting point for the express train bound east. Brownstown was not a usual stopping place for No. 5, and the company did not profess to leave or receive passengers there on that train. There were two other passenger trains at that time which stopped at Brownstown and North Vernon—No. 1 and No. 3. Two passenger trains stopped there going east, and two going west, daily. No. 5 was the only one that did not stop there going west. It did not stop at Brownstown because it was a night express and was mostly for through business. Brownstown was not a stopping place for that train on the time card, and never had been, if I recollect correctly. I have seen appellee and Wilkerson on the trains frequently, principally between Brownstown and Seymour.”

The appellee testified in rebutting as follows:

“I know R. H. Sawyer and R. J. C. Smith. I heard Sawyer’s statement while on the witness stand. I have no recollection of having any such conversation with Saw-

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yer before I bought the ticket, as detailed by him. I have no recollection of having any such conversation with him afterwards, as detailed by him. Did not have such conversation with Fields as stated in his deposition. We were not under the influence of liquor at the time we got on the train at North Vernon. Defendant don't take passenger tickets on freight trains. Have seen the conductor refuse them. I have no recollection of Sawyer ever having notified me that No. 5 did not stop at Brownstown."

We think it apparent from the evidence that the appellee was in fault in going upon a train to return to Brownstown, which he knew, or by reasonable diligence might have known, did not stop at that place.

The fact that the appellee and his companion succeeded in getting their return tickets into the hands of the conductor, and then, after he found where they wished to be put off, refused to take them back from him, adds nothing to the merits of the appellee's case.

We think the theory, in point of law, on which the case was tried, was a wrong one. It is the duty of a party going upon a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the railroad company, and if he make a mistake, not induced by the company, and against which ordinary diligence and care would have protected him, he has no remedy for the consequences against the company. *The Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141, and cases cited; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 436; *Chicago, etc., R. R. Co. v. Randolph*, 53 Ill. 510.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Petition for a rehearing overruled.

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158	242
52	547
167	148

**CITY.—Sewer.—Insufficiency of Public Sewer for Private Use.**—A city, incorporated under the general law for the incorporation of cities in this State, by its contractor, and under and in accordance with an ordinance of the common council, constructed a sewer along a street of said city, one-half of the cost of which was assessed against and paid by the owners of the real estate abutting upon said street. Said sewer not being of sufficient capacity to carry off the sewerage that was drained into it during hard rains of ordinary occurrence, one of said owners, under and in compliance with a permit obtained by him of said city in accordance with an ordinance thereof, tapped said sewer and connected therewith his premises abutting on said street, paying said city a certain sum for said privilege. By reason of said insufficiency in the capacity of the sewer, the basement of said owner's house was subject to frequent overflows from the backwater of said sewer through the connecting pipe, and by such overflows said premises were injured, which injury could be avoided only by the closing and disuse of said connecting pipe, thereby diminishing the rental value of said premises.

**Held**, that the tenant of said owner, during whose tenancy such injury occurred, and who, at the time he became a tenant, had no knowledge of such insufficiency of the capacity of the sewer, had no cause of action against the city.

**SAME.—Liability of Municipal Corporation.**—Municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby, or for the exercise of their ordaining powers, however mistaken or corrupt their policy may be, and although private injury may result therefrom. They are liable to individuals for wrongful acts or derelictions of duty in the exercise of their ministerial powers, whenever injury to private rights is the direct and natural consequence; and, when liable, they are liable the same as individuals would be under the same circumstances.

**PLEADING.—Contributory Negligence.**—An allegation in a complaint that a wrong complained of was done without the fault or negligence of the plaintiff is not necessary in a case of trespass, and where the wrong complained of was committed by some positive, affirmative act; it is necessary only where the issue is solely a question of negligence.

From the Marion Civil Circuit Court.

*D. V. Burns*, for appellants.

*C. Byfield*, for appellee.

**BIDDLE, J.**—The complaint in this case states the following substantial facts:

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That the appellants are partners, doing business under the firm name and style of Roll & Morris; that they are, and for the year last past have been, in the possession, under a lease from Isaac H. Roll, of lot No. 2, in square No. 67, in the city of Indianapolis, on which is situated a certain building, containing a well-finished basement story, which lot and building abuts on South Illinois street, and has been occupied by the plaintiffs for the year last past as a store-room, in which they carry on a wholesale and retail carpet, wall-paper, and upholstering business; that the surface drainage on Illinois street and in front of said building is, and was at the time of the happening of the grievances hereinafter mentioned, sufficient to carry off all the water that fell on the same; that on the — day of —, 18—, the city of Indianapolis, by her common council, caused to be established on said Illinois street, and immediately in front of the premises so occupied by plaintiffs, a sewer of small dimensions, to wit, of the dimensions of eighteen inches in diameter, and at the same time assessed one-half of the cost of the same against the owners of the real estate abutting thereon, which amount was duly paid by the owner of the property so occupied by the plaintiffs, thus giving him, or the occupants thereof, the right to tap said sewer for the purpose of carrying away from said premises all proper matter of sewerage; that, in pursuance of said right, plaintiffs did, on the — day of —, 187—, cause said sewer to be tapped in a proper and skilful manner, and under the direction of the agents of said defendant, immediately in front of their said premises, for the purpose of making the proper connections therewith for the conveying away of the sewerage matter from said premises. They further aver that said sewer is sufficient to carry away all proper matter of sewerage from the premises adjoining thereto, and which have the right to use the same, but that the same is wholly inadequate for any other purpose, and especially for conveying off the surface water from said street. Yet, notwithstanding the insufficient capacity of said sewer, the said

defendant, heretofore, to wit, on the —— day of ——, 187—, by her common council, caused to be established on said South Illinois street catch-basins, by means of which all the water from the surface of said street in the vicinity thereof is let into said sewer, which catch-basins the defendant has ever since maintained, and still wrongfully maintains; that by reason thereof said sewer is filled to overflowing during every ordinary rainfall, and does overflow and flood the plaintiffs' said premises on every such occasion, through the connecting pipes hereinbefore mentioned, thus materially interfering with the comfortable enjoyment of their said premises; that they have sustained damages in the sum of one thousand dollars by reason of said wrongs; that the pavement between the area wall and the front wall of their basement has been repeatedly washed up, so that the same has had to be relaid at great cost; that they have been deprived of the use of their said basement story by reason of said wrongs; and that the same is of great rental value, to wit, twelve hundred dollars per year. Prayer, that the defendant be enjoined from letting the surface water into said sewer, that the catch-basins be taken out, and for damages.

Subsequently there was a supplemental complaint. A motion to strike out and a demurrer to the complaint were filed and ruled upon, but no exceptions were reserved or errors assigned thereon by the plaintiffs, and they therefore need not be further noticed at this point. Answer by general denial and a special paragraph. The latter was struck out on motion, and exception taken, but no error is assigned upon the ruling. Jury waived, trial and special finding by the court, which, at the request of the appellants, was stated, with the conclusions of law thereon, as follows:

“That the city of Indianapolis, pursuant to an ordinance of the common council, caused to be constructed by her contractor, John W. Dodd, a sewer, under and along the line of South Illinois street, from Washington street on the north to South street on the south, of eighteen inches interior diam-

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eter, for the purpose of conducting off the surface drainage and house drainage through such connections as might be made with the city's permission, duly obtained; that said sewer was constructed in all respects in accordance with the requirements of the ordinance and the stipulations of the contract for its construction, dated on the 16th day of July, 1870, and was accepted by the city; that one-half of the cost of construction of the same was assessed against, and collected from, the abutting property owners; that, at the time of the construction of said sewer, Isaac H. Roll was the owner of the premises described in the complaint, which abutted upon said street, and that he was assessed, with others, for said construction, and paid his assessment; that said sewer, as constructed, was not of sufficient capacity to carry off the sewerage that was drained into it during hard rains of ordinary occurrence; that said Isaac H. Roll, in August, 1873, applied to and obtained from the proper city authorities a permit to tap said sewer with a connecting pipe from his said premises, pursuant to the provisions of another ordinance of said city regulating the making of such connections, and was taxed and paid said city the sum of ten dollars for the privilege of doing so, and under said permit did tap said sewer with an eight-inch pipe, running from said premises and entering said sewer and discharging into the same; that the permit granted to said Roll, and under which he made such connection, contained this proviso: 'Provided, however, and the permit is hereby granted only on this express condition, that the owners and tenants for whose benefit such drain and connections are made, and each succeeding tenant, in consideration of the privileges hereby granted and hereafter enjoyed, shall hold the city of Indianapolis harmless from any loss or damage that may in any wise result from, or be occasioned by, the construction, use or existence of such tap or connection.' And, further, said permit had printed on the back certain 'rules for laying drains,' among which, numbered in order 8, was this: 'Privy vaults shall not be connected with the sewers.'

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“The ordinance of said city, of 1871, regulating the laying and connecting with said sewer, provided that ‘no person shall drain into any sewer, or drain the contents of any \* \* privy vault, unless express permission is granted by the city council, who shall charge for the privilege thus granted any sum not exceeding one hundred dollars,’ and enacted a penalty for the violation of this provision; that said Roll ran his said connecting pipe from said sewer into the area vault under the sidewalk in front of said premises, and then connected it with the water-closet or privy of said premises, discharging the sewerage therefrom into said connecting pipe and sewer; he also discharged into it the water from part of the roof and the water-pipes for the water supplied to said building by the water-works. The same ordinance of the city forbids connections with the sewers otherwise than by drain-pipes, which should be six inches in diameter, except in special cases it be otherwise ordered by a unanimous vote of the council; and Roll’s connecting pipe was eight inches in diameter, and was laid without such special permission; such difference in the size of the pipe did not contribute materially to the injury complained of. In other respects the connection was properly made.

“The plaintiffs, as partners in the carpet and wall-paper business, became the occupants of said premises, as tenants of said Roll, in January, 1874; that, at the time they became such tenants, they had no knowledge of the insufficiency of said sewer to discharge the water drained into it from the street; that, by reason of such insufficiency of said sewer, and by reason of the said connecting pipe, the basement of the plaintiffs’ store is liable to frequent overflowing from the backwater of said sewer through said connecting pipe; that said danger could be avoided by the stopping and disuse of said connecting pipe, which would, however, deprive the plaintiffs of the use of said water-closet, and of the benefits of said sewer; and there is no other accommodation of the kind about the premises, nor any place to put one; that the rental value of said basement room with the

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water-closet, and without danger of overflow, would be one thousand dollars per annum; as it is now, it is worth five hundred dollars per annum. During the time the plaintiffs have occupied the premises, they have sustained fifty dollars actual damages, occasioned by the back flow of water.

“And the court finds, as a conclusion of law, that on the foregoing state of facts the plaintiffs have no cause of action against the city of Indianapolis; to which conclusion of law the appellants at the time excepted.”

The plaintiffs moved the court “for judgment on the special finding of the facts herein, for the reason that all the facts found by the court, which are embraced within the issues joined in the cause, entitle them thereto;” which motion was overruled, and exception taken at the time. Thereupon the plaintiffs moved for a new trial, and filed the following causes therefor:

1. The finding of the court is contrary to law.
2. The finding of the court is contrary to the evidence, and is not sustained thereby.

The motion was overruled, to which ruling the plaintiffs at the time excepted. Judgment. Appeal.

The errors assigned in this court are:

1. Said court erred in overruling appellants’ motion for a judgment on the special finding of the facts.
2. The said court erred in its conclusions of law, drawn from the facts found, *i. e.*, its conclusions of law upon the special finding.
3. The said court erred in overruling appellants’ motion for a new trial, and in rendering judgment for appellee.

The appellee, as a cross error, assigns the overruling of the demurrer to the complaint.

The question presented in this case is one of intrinsic difficulty. The authorities may possibly be reconciled, but they are not entirely harmonious. No doubt the discrepancies sometimes arise out of the differences in the powers granted by municipal charters, which are not always distinguished in the decisions, leaving us in danger of being mis-

led by propositions which seem general, when they are applicable only to given municipalities. There are certain principles, however, maintained so uniformly that we think they may be held as established:

1. That municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby.

2. They are not liable to individuals for the exercise of their ordaining powers, however mistaken, or even corrupt, their policy may be, and although private injuries may result therefrom.

3. They are liable to individuals for wrongful acts, or derelictions of duty, in the exercise of their ministerial acts, whenever injury to private rights is the direct and natural consequence.

4. When liable, they are liable the same as individuals would be under the same circumstances. But it is often difficult to clearly distinguish between their judicial, ordaining and ministerial acts, as these powers and duties are frequently blended, and quite impossible to derive much light from the analogy to personal liabilities, because individuals are seldom clothed with the powers, or charged with the duties, which belong to municipal corporations.

The case of *The Mayor, etc., of The City of New York v. Furze* was as follows:

“Furze brought an action on the case in the court below against the mayor, aldermen and commonalty of the city of New York, averring in his declaration, that he was the owner and occupant of a building situated upon Pearl street in said city, wherein he carried on the business of a baker and confectioner; that there were certain basins, culverts, and sewers in said street, designed for conducting and carrying off the water running in and upon the same, which basins, culverts, and sewers the defendants were bound to keep in proper condition and repair; that the said basins, culverts and sewers became filled up and obstructed, so that they would not carry off the water, etc.: yet the defendants,

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well knowing, etc., refused and neglected to remove said obstructions and keep said basins, culverts and sewers in proper condition and repair; by reason whereof the premises of the plaintiff were overflowed, and his building, fixtures, etc., together with a large quantity of flour, sugar, etc., then upon said premises, were damaged, etc., and the plaintiff deprived of the use of his building, etc.”

Plea, the general issue, jury trial, verdict for plaintiff, and judgment; which was affirmed by the Supreme Court. 3 Hill, 612.

In the case of *Wilson v. The Mayor, etc., of the City of New York*, wherein it was alleged that the plaintiff was the owner of a certain house and four lots at the corner of Fortieth street and Seventh avenue, and that defendants had so carelessly and negligently raised and graded said avenue and street as to obstruct the flowing water from her premises, turned the water and caused it to run upon her premises, the defendants having omitted to construct or make any sewer, gutter, or drain along said street or avenue, etc., it was held the plaintiff could not recover. The case of *The Mayor, etc., v. Furze*, above cited, was explained and limited. 1 Den. 595.

The case of *The Rochester White Lead Co. v. The City of Rochester* was brought for damages to the plaintiff's factory and a quantity of white lead, occasioned by the insufficient and unskilful construction of a culvert built by the defendant, which was sufficient to carry off the natural stream of water, but insufficient when a great fall of rain and the melting of snow occurred. In this case, *The Mayor, etc., v. Furze, supra*, was cited with approval, and the city of Rochester held liable. 3 Comstock, 463.

In the case of *Dermont v. Mayor, etc., of Detroit*, 4 Mich. 435, which was an action on the case for injury done to merchandise stowed in the plaintiff's cellar, by reason of the water from one of the public sewers of the city of Detroit flowing back through his private drain into the cellar, it was held that a municipal corporation is not liable, at the

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suit of an individual, for damages arising from the insufficiency, or defective construction, of a public sewer, where such damages result directly to the party injured, from his use of it for his private convenience, and that the payment of a sum annually, by an individual, for the privilege of draining into a public sewer, is evidence of a license only, and not an undertaking and guaranty, on the part of the city, to furnish ample drainage for the premises of such person. In this case WILLSON, J., remarks:

“The powers granted to municipal corporations for the laying out and making of highways, and for opening and grading streets, and the construction of sewers, involve the exercise of discretion on the part of the municipal authorities, and should be employed for the benefit of the public at large, and not for the private convenience or advantage of individuals; nor are the officers of a municipal corporation justified in the exercise of those powers, except in reference to the public demands. The sewers are built as well for sanitary purposes as for drainage for the benefit and advantage of the public at large; and the city owes no legal duty or obligation to individuals in their construction, maintenance or repair. As was well said on the argument, the sewers are built by general tax; not for any particular individual, but for the general welfare; not with a view, perhaps, of any perfect good to any one, but the greatest good to the greatest number.”

In this case, the sewer was built by a general tax; in the case before us, one-half of the cost of the sewer was paid by the owners of the abutting property. What difference this distinction should make, if any, in the decision of the case, the learned judge did not remark; but it is a distinction not to be forgotten in considering the two cases together.

*Carr v. The Northern Liberties*, 35 Penn. St. 324. This action was brought to recover damages sustained by the plaintiffs by reason of the flooding of their premises, at the southeast corner of Fifth and Poplar streets, in consequence, as it was alleged, of the neglect of the defendants to provide

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well knowing, etc., refused and neglected to carry off the water at obstructions and keep said basins in good and sufficient manner proper condition and repair; but negligently constructed, and the basins of the plaintiff were overflowed and was subsequently kept. A etc., together with a large number of persons, who were present upon said premises, were J., in delivering the opinion of the court, deprived of the use of the streets:

Plea, the general issue, that the drainage is by means of judgment; which is the case in most of our towns have nothing else; and Hill, 612.

In the case of *New York, v. The City of New York*, the court held that this means is inadequate for protecting cellars and the sudden melting of deep snow occasion. The owner of property on a lot, who does not have gutters that would protect against these, would be liable for damages. The court held that whole streets should be converted into gutters, and thus made, in a measure, impassable as streets. The court held that lots on low ground, and cellars and low floors, are naturally subject to be flooded, and to save them from all risk of this, the city would require drainage regulations that could not be endured. \* \* \*

And if people who choose to build houses and cellars in places where they are exposed to floods, are entitled to damages for being flooded, then, of course, people having gardens, coal-yards, lumber-yards, or even vacant lots, must also be protected. \* \* Here it becomes manifest how careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either."

The case was affirmed in the Supreme Court.

In the case of *Barton v. The City of Syracuse*, 37 Barb. 292, the plaintiff brought his action to recover damages to property stored in his cellar, caused by the flow of water thrown from the common sewer of the city through the drain of the plaintiff. In delivering the opinion of the court, ALLEN, J., says:

"It is assumed by the counsel for the defendant that the

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In large and populous cities a wise system of sew-  
is indispensable to life and health; for in no other way  
an provision be made for receiving and conducting away  
the surplus waters and impurities, which, if suffered to  
remain, would cause disease and pestilence. In no other  
way than by means of common sewers constructed by the  
city can cellars and basements be drained and made fit for  
use. And if the public cannot use them for the purpose of  
drainage, they will not accomplish the end for which they  
are designed."

In this case, the question also arose of the right of the  
plaintiff to put in and connect his private drain with the  
public sewer. A city ordinance provided, "that each and  
every person who shall dig in any street, for any purpose,  
either to connect with a sewer, or water or gas-pipes, shall  
first serve a notice in writing on the clerk of the city, to the  
effect that he or she desires to dig in the street, giving the  
location and name of its owner, that the clerk may keep a  
register of the same. A neglect to serve such notice shall  
subject the person offending to a penalty of not less than  
two nor more than twenty-five dollars." The plaintiff did  
not give such notice when he put in his private drain; but  
the court held that the want of such notice did not make the  
digging in the street, nor the connection with the sewer,  
unlawful, as the penalty was not imposed for making the  
connection, but simply for not giving the notice, and the  
connection, not being prohibited, could not be classed among  
acts, which, being prohibited, and therefore unlawful, denied  
the plaintiff an action against a wrong-doer. The plaintiff

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sufficient inlets to their culverts to carry off the water at that point, the improper, unskilful, and insufficient manner in which the culvert was originally constructed, and the negligent manner in which it was subsequently kept. A recovery below was denied.

On error, LOWRIE, C. J., in delivering the opinion of the court, reasons as follows:

“A very large portion of all such drainage is by means of mere gutters, and most of our towns have nothing else; and yet everywhere this means is inadequate for protecting cellars, in some localities, against the flooding which long and heavy rains and the sudden melting of deep snow occasion. To make gutters that would protect against these, would often require that whole streets should be converted into gutters, and thus made, in a measure, impassable as streets. Lots on low ground, and cellars and low floors, are naturally subject to be flooded, and to save them from all risk of this, would require drainage regulations that could not be endured. \* \* \* And if people who choose to build houses and cellars in places where they are exposed to floods, are entitled to damages for being flooded, then, of course, people having gardens, coal-yards, lumber-yards, or even vacant lots, must also be protected. \* \* Here it becomes manifest how careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either.”

The case was affirmed in the Supreme Court.

In the case of *Barton v. The City of Syracuse*, 37 Barb. 292, the plaintiff brought his action to recover damages to property stored in his cellar, caused by the flow of water thrown from the common sewer of the city through the drain of the plaintiff. In delivering the opinion of the court, ALLEN, J., says:

“It is assumed by the counsel for the defendant that the

sewer is the exclusive property of the city, designed and intended to be used only for the carrying off the water from the street, and that which would otherwise pass over the surface and in the gutters. \* \* But sewers are constructed mainly in reference to a more thorough drainage than can be obtained in any other way, not only of the streets, but of the adjoining lots, and with a view to health, as well as the more convenient enjoyment of the premises drained. In large and populous cities a wise system of sewerage is indispensable to life and health; for in no other way can provision be made for receiving and conducting away the surplus waters and impurities, which, if suffered to remain, would cause disease and pestilence. In no other way than by means of common sewers constructed by the city can cellars and basements be drained and made fit for use. And if the public cannot use them for the purpose of drainage, they will not accomplish the end for which they are designed."

In this case, the question also arose of the right of the plaintiff to put in and connect his private drain with the public sewer. A city ordinance provided, "that each and every person who shall dig in any street, for any purpose, either to connect with a sewer, or water or gas-pipes, shall first serve a notice in writing on the clerk of the city, to the effect that he or she desires to dig in the street, giving the location and name of its owner, that the clerk may keep a register of the same. A neglect to serve such notice shall subject the person offending to a penalty of not less than two nor more than twenty-five dollars." The plaintiff did not give such notice when he put in his private drain; but the court held that the want of such notice did not make the digging in the street, nor the connection with the sewer, unlawful, as the penalty was not imposed for making the connection, but simply for not giving the notice, and the connection, not being prohibited, could not be classed among acts, which, being prohibited, and therefore unlawful, denied the plaintiff an action against a wrong-doer. The plaintiff

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sufficient inlets to their culverts to carry off the water at that point, the improper, unskilful, and insufficient manner in which the culvert was originally constructed, and the negligent manner in which it was subsequently kept. A recovery below was denied.

On error, LOWRIE, C. J., in delivering the opinion of the court, reasons as follows:

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In this case, the question also arose of the right of the plaintiff to put in and connect his private drain with the public sewer. A city ordinance provided, "that each and every person who shall dig in any street, for any purpose, either to connect with a sewer, or water or gas-pipes, shall first serve a notice in writing on the clerk of the city, to the effect that he or she desires to dig in the street, giving the location and name of its owner, that the clerk may keep a register of the same. A neglect to serve such notice shall subject the person offending to a penalty of not less than two nor more than twenty-five dollars." The plaintiff did not give such notice when he put in his private drain; but the court held that the want of such notice did not make the digging in the street, nor the connection with the sewer, unlawful, as the penalty was not imposed for making the connection, but simply for not giving the notice, and the connection, not being prohibited, could not be classed among acts, which, being prohibited, and therefore unlawful, denied the plaintiff an action against a wrong-doer. The plaintiff

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sufficient inlets to their culverts to carry off the water at that point, the improper, unskilful, and insufficient manner in which the culvert was originally constructed, and the negligent manner in which it was subsequently kept. A recovery below was denied.

On error, LOWRIE, C. J., in delivering the opinion of the court, reasons as follows:

“A very large portion of all such drainage is by means of mere gutters, and most of our towns have nothing else; and yet everywhere this means is inadequate for protecting cellars, in some localities, against the flooding which long and heavy rains and the sudden melting of deep snow occasion. To make gutters that would protect against these, would often require that whole streets should be converted into gutters, and thus made, in a measure, impassable as streets. Lots on low ground, and cellars and low floors, are naturally subject to be flooded, and to save them from all risk of this, would require drainage regulations that could not be endured. \* \* \* And if people who choose to build houses and cellars in places where they are exposed to floods, are entitled to damages for being flooded, then, of course, people having gardens, coal-yards, lumber-yards, or even vacant lots, must also be protected. \* \* Here it becomes manifest how careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either.”

The case was affirmed in the Supreme Court.

In the case of *Barton v. The City of Syracuse*, 37 Barb. 292, the plaintiff brought his action to recover damages to property stored in his cellar, caused by the flow of water thrown from the common sewer of the city through the drain of the plaintiff. In delivering the opinion of the court, ALLEN, J., says:

“It is assumed by the counsel for the defendant that the

sewer is the exclusive property of the city, designed and intended to be used only for the carrying off the water from the street, and that which would otherwise pass over the surface and in the gutters. \* \* But sewers are constructed mainly in reference to a more thorough drainage than can be obtained in any other way, not only of the streets, but of the adjoining lots, and with a view to health, as well as the more convenient enjoyment of the premises drained. In large and populous cities a wise system of sewerage is indispensable to life and health; for in no other way can provision be made for receiving and conducting away the surplus waters and impurities, which, if suffered to remain, would cause disease and pestilence. In no other way than by means of common sewers constructed by the city can cellars and basements be drained and made fit for use. And if the public cannot use them for the purpose of drainage, they will not accomplish the end for which they are designed."

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had judgment, and the case went to the Court of Appeals, where it was affirmed. 36 N. Y. 54.

It appeared in the case of *Barry v. City of Lowell*, that a public sewer had been built through the street upon which the plaintiff's house was situated, which was not laid deep enough to drain the plaintiff's cellar, and no drain led from the cellar to the sewer. There was a cesspool opposite to the plaintiff's house, which was frequently obstructed by dirt and gravel, and in winter by snow and ice, which prevented the water from passing through the same, and the water in such cases flowed over into the plaintiff's cellar; though when the sewer and cesspool were free from obstruction, the water would all pass through them. A verdict was taken for the plaintiff by consent, and the case reported for the determination of the whole court. On review, the reasoning of the court was expressed as follows:

"Since the plaintiff was not required to conform his drainage to that which the city had provided for public purposes, and had in fact never made use in that way of the common sewer which they had constructed, he had a right to prevent the overflow of water from it on to his own land by erecting such obstructions there as were necessary for that purpose. But if he omitted to do so, and sustained damage in consequence of the failure of the defendants to keep their own works in good order or in due repair, he can maintain no action therefor, because none is provided for by statute, and because by the use of lawful means he might have prevented the injury."

The verdict for plaintiff was set aside, and judgment rendered for defendant. 8 Allen, 127.

In Kansas it has been held, that "after a city has constructed a sewer or drain, for the purpose of carrying off surface water, it may, in its discretion, wholly abandon or discontinue the same, and never make any further use of it; and where the city does not leave individuals in any worse condition by such abandonment or discontinuance than they would be if such sewer or drain had never been

made, the city will not be liable for any injury to individuals caused by the flow of surface water." *City of Atchison v. Challiss*, 9 Kansas, 603.

In the city of Toronto, Canada, the plaintiff gave notice to the committee of the council forming the board of public works, that he wished a drain made for the purpose of draining his cellar, and paid the sum demanded. The drain was constructed under the superintendence of the city engineer, by the contractors with the city, but was so unskilfully made that it would not carry off the water, and in times of flood the water and filth from the main sewer flowed back through the drain into the plaintiff's cellar, putting him to much inconvenience. *Held*, that an action would lie against the corporation for the damages. But in the city of Toronto the corporation takes upon itself the construction of drains required to lead from the houses into the main sewers, and keeps them under police regulations; and it appears, also, that it draws a tax therefrom; all of which, doubtless, form material elements in its liability for the improper construction of the sewer, or for not keeping it in repair. *Reeves v. The City of Toronto*, 21 U. C. Q. B. 157.

The general principles governing the liability of municipal corporations for injuries to private rights may be found in the following cases in our reports: *Ross v. The City of Madison*, 1 Ind. 281; *The City of Madison v. Ross*, 3 Ind. 236; *The City of Vincennes v. Richards*, 23 Ind. 381; *The City of Logansport v. Wright*, 25 Ind. 512; *Stackhouse v. The City of Lafayette*, 26 Ind. 17; *The City of Indianapolis v. Miller*, 27 Ind. 394; *Brinkmeyer v. The City of Evansville*, 29 Ind. 187; *City of Indianapolis v. Huffer*, 30 Ind. 235; *The City of Columbus v. The Hydraulic Woollen Mills Co.*, 33 Ind. 435; *The City of Indianapolis v. Lawyer*, 38 Ind. 348; *The City of Lafayette v. Blood*, 40 Ind. 62.

The following decisions throw light, more or less directly, upon the question under consideration, and may be consulted with advantage: *Commissioners of Kensington v. Wood*, 10 Penn. St. 93; *Creal v. The City of Keokuk*, 4

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Greene, Iowa, 47; *City Council of Montgomery v. Gilmer*, 33 Ala. 116; *Flagg v. City of Worcester*, 13 Gray, 601; *Cotes v. The City of Davenport*, 9 Iowa, 227; *Munn v. The Mayor, etc., of Pittsburgh*, 40 Penn. St. 364; *Child v. The City of Boston*, 4 Allen, 41; *Mills v. The City of Brooklyn*, 32 N. Y. 489; *Donohue v. The Mayor of New York*, 3 Daly, 65; *Emery v. The City of Lowell*, 104 Mass. 13; *Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. The City of Burlington*, 30 Iowa, 262; *Judge v. The City of Meriden*, 38 Conn. 90; *Grant v. The City of Erie*, 69 Penn. St. 420; *City of McGregor v. Boyle*, 34 Iowa, 268.

The appellee, under the assignment of the cross error, insists that the complaint of appellants is insufficient, because it nowhere alleges that the wrongs complained of were done without the fault or negligence of the appellants. Such an allegation is necessary only in cases where the issue is solely a question of negligence. In cases of trespass, and where the wrong complained of is committed by some positive, affirmative act, the negation of fault or negligence on the part of the plaintiff is not necessary.

In this case the appellee is charged with the wrongful establishment of an insufficient sewer, and certain catch-basins, and improperly turning certain drainage into them, whereby the appellants were injured in their property. There is no question of negligence involved in the issue; it is unnecessary, therefore, for the appellants to allege that they are without fault or negligence. We are of the opinion that the complaint is sufficient.

According to the general principles which govern the powers and enforce the duties of municipal corporations, and on a full review of the authorities, we are of opinion that the finding of the court below does not show a cause of action against the appellee.

The appellants in their brief do not urge the insufficiency of the evidence to sustain the finding, and we do not examine that question.

The judgment is affirmed, with costs.

## ON PETITION FOR A REHEARING.

BIDDLE, J.—The appellants make the following points in their petition for a rehearing:

1. That this court held the complaint good, and the court below found the complaint to be true. That the ordinance stipulated “that the owner of the premises, and those holding under him, should hold the city harmless by reason of any damages which might accrue by reason of parties tapping the sewer.” That the conclusion of law of the court below was based on this proviso in the ordinance, by reason of which the appellants could not recover; and that this court did not decide that question.

It is true that the finding of the court below covered the ground taken by the complaint, but it did not find all the averments contained therein, as alleged, to be true, by any means; and we can look only to the finding, not the averments of the complaint. There is nothing in the record to inform us upon what ground the court below based its conclusion of law favorable to the city. It simply found, “as a conclusion of law, that on the foregoing state of facts the plaintiffs have no cause of action against the city of Indianapolis.” We did not decide whether the city was protected by the proviso in the ordinance or not, because we had not been convinced by the finding of the court below that the city had caused any private injury to the appellants, for which it was liable. It was quite useless to decide the question of protection before the wrong from which the city was to be protected had been established.

2. It is urged in the petition that the evidence sustains the complaint, and, the complaint being sufficient, a new trial should have been granted.

The question whether the evidence proves the complaint or not is not before us. The true question as to the evidence is, does it sustain the finding? The counsel for appellants did not, either in their written briefs or oral

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argument, show us wherein, nor for what reason, the evidence did not sustain the finding. We must therefore conclude that it did, for the presumptions are with the court below.

3. The appellants cite the case of *The City of Indianapolis v. Huffer*, 30 Ind. 235, against our opinion in this case, and quote the following extract:

“The skill and care which is incumbent relates as well to the capacity of the sewer as to the mere mechanism in its construction, as well to its plan as to its execution.” This remark relates to consequential injuries to private rights which flow from the public use of a sewer. In the case we are considering, the complaint against the city is for not constructing a sewer sufficiently large to accommodate, besides its public use, the private drain of the appellants. It is not shown that the appellants have been injured by the insufficiency of the sewer for public use. Indeed, by the finding of the court, quite the contrary appears.

4. In view of the importance of the case, its voluminous record, and the numerous questions involved, the appellants desired to have their case presented orally. Their desire was granted, the argument on their behalf heard attentively, and carefully considered. In the main, the authorities produced were the same as those we have cited in support of our opinion, and we do not perceive that the grounds on which it rests have been disturbed. They may be briefly recapitulated as follows:

1. There was no obligation to private individuals resting upon the city of Indianapolis to construct the sewer complained of at all, and no liability to private persons would be incurred by refusing to do so.

2. The construction of the sewer, or not, was a question for the legislative or ordaining power of the city to decide, and one which the courts cannot revise, even though the decision was erroneous.

3. In constructing the sewer, public interests properly

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controlled, and not private rights, though they should not be injured thereby.

4. Having constructed the sewer, its insufficiency for public use did not, of itself, give a private remedy to the appellants, simply because it would not accommodate their private drain. The city was not bound to construct the sewer for the private advantage of any person.

5. It was optional with the appellants to tap the public sewer, or not, with their private drain, according to the terms offered them by the ordinance. The sewer was constructed, its size and capacity to do its work, or not, were apparent to be seen by all persons, before the appellants exercised their optional right. Their act was voluntary; they were not bound to accept the terms of the ordinance.

The finding of the court shows that by a disuse of their private drain all the injury complained of will be avoided. It would seem, then, that the city, instead of causing a private injury to the appellants by the public use of the sewer, has simply failed to provide the appellants with the private advantage of draining their cellar. Without their private drain, the appellants stand with the general public on the same footing of equality, and this is all they have a right to demand.

The petition is overruled.

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THE CITY OF MOUNT VERNON ET AL. v. HOVEY.

CITY.—*Bonds Donated to Railroad.—Bona Fide Holder.*—It is settled that section 60 of the general law of March 14th, 1867, for the incorporation of cities in this State (3 Ind. Stat. 93), providing that cities incorporated under said act have power to borrow money to subscribe to the stock of any plank road, macadamized road or railroad running into or through such city, to make donations in money or the bonds of such city to aid in the construction of such roads, on petition of a majority of the resident freeholders thereof, etc., is constitutional; and bonds regularly issued and delivered by the authority of said section, in the hands of a *bona fide*

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holder, for a valuable consideration, without notice, must be regarded as public securities and placed on a footing with bills of exchange.

**SAME.**—*Consolidation of Railroads After Order of Donation and Before Issue of Bonds.—Injunction.*—The common council of a city incorporated under the general law for the incorporation of cities in this State, upon petition of a majority of the resident freeholders of the city, made an order for the donation of a certain amount in the bonds of the city to a railroad company, incorporated under the laws of this State, to aid in the construction of its railroad running into said city. Before the bonds had been actually issued, said company was consolidated with another railroad company, incorporated under the laws of an adjoining state, the consolidated company taking a new name; and afterwards, without further petition or further order of donation, the bonds of said city so ordered were issued and delivered to the consolidated company, being made payable to bearer, and reciting that they were issued by authority of said act of March 14th, 1867, and in pursuance of the proper petition and order of the common council of said city, of a given date, making a subscription in bonds of said city to aid in the construction of the railroad named in said petition and order, "now consolidated with and forming a part of" said consolidated company, giving its name; and afterwards said bonds were sold to a purchaser without notice, and the city for some years regularly paid the interest thereon. Suit by a taxpayer of said city for an injunction, to restrain the collection of a certain amount of tax assessed against him for the payment of the interest on said bonds and to create a sinking fund for the payment of the principal, no irregularity in the petition of the freeholders or in said order of the common council making the donation being shown, and no irregularity in the consolidation of said railroad companies being claimed.

*Held*, that an injunction would not lie.

From the Posey Circuit Court.

*M. W. Pearse*, for appellants.

*J. Pitcher, H. C. Pitcher, A. P. Hovey and G. V. Menzies*, for appellee.

**BIDDLE, J.**—The appellee brought suit below against the appellants, to enjoin the collection of certain taxes assessed against him. The complaint contains three paragraphs. The averred facts upon which appellee relies, as presented in the third paragraph of the complaint, may be stated as follows:

That he is a freeholder and tax-payer of the city of Mount Vernon; that he is the owner of real and personal property

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within the limits of the city, of the value of twenty-four thousand six hundred and fifty-five dollars; that the assessment made by the common council of said city against the plaintiff, for the year 1874, amounts to the sum of five hundred and fifty-four dollars and seventy-four cents; that of said sum sixty-four dollars and seventy-eight cents are for the payment of interest on, and to provide a sinking fund for the payment of the principal of, the bonds of said city, issued and delivered to the Chicago and Illinois Southern Railroad Company; that on the 25th day of December, 1868, the common council of said city, in pursuance of a petition by a majority of the freeholders thereof, and of an act of the legislature of Indiana, approved March 14th, 1867, made an order to donate the sum of two hundred thousand dollars in the bonds of said city to the Mount Vernon and Grayville Railroad Company, a corporation then existing under the laws of this State, to aid in building her road, but that no part of said bonds were ever issued or delivered to said Mount Vernon and Grayville Railroad Company; that on the 14th day of April, 1870, the said Mount Vernon and Grayville Railroad Company was consolidated with the Grayville and Mattoon Railroad Company, a corporation then existing by virtue of the laws of the State of Illinois, and that after said consolidation the said roads became and were known as the said Chicago and Illinois Southern Railroad Company; that on the 28th day of March, 1871, the said common council, without any further petition of the freeholders of said city, or any further order of donation, issued and delivered said bonds to the said Chicago and Illinois Southern Railroad Company, which road is now abandoned and worthless; that he has paid all of said taxes so assessed against him, except the said sixty-four dollars and seventy-eight cents, which the said Terry, as treasurer of said city, threatens and is about to proceed to collect against him. Prayer for a perpetual injunction.

The complaint is accompanied with the proper exhibits, and the averments are formally alleged. The bonds are pay-

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able to bearer, and on their face recite that they were issued under the authority of the act of March 14th, 1867, "and in pursuance of the proper petition and order of the common council of said city, dated the 25th day of December, 1868, making a subscription in bonds of said city to aid in the construction of the Mount Vernon and Grayville Railroad, now consolidated with, and forming a part of the Chicago and Illinois Southern Railroad."

The appellants answer each paragraph of the complaint separately, and answer the whole complaint by a fourth paragraph, in which they admit the issuing of the bonds, the levy of the tax, and the consolidation of the roads, as alleged in the complaint; but aver that said consolidation was made in accordance with a public statute of the State of Indiana, and that, by the terms of said consolidation, the said railroad was to be built from Mount Vernon, Indiana, to Grayville, Illinois, and thence to Mattoon, in said last mentioned State. That, at the time said bonds were issued, said railroad was so far completed as to admit the running of trains thereon for a distance of more than five miles in a northerly direction from the city of Mount Vernon, and towards said town of Grayville. That the proposal of said city to donate two hundred thousand dollars in its bonds, to aid in constructing said railroad, was duly accepted by said Mount Vernon and Grayville Railroad Company, acted upon by its board of directors, and said sum treated by said company as part of its assets. That said bonds were issued by said city for the purpose prayed for in the petition presented, and for no other purpose. That, after the issuing and delivery of said bonds to said railroad company, the same were sold to one George Opedyke, a resident of the city of New York, without notice to him, either by said plaintiffs or defendants, or by said railroad company, or any other person, of any fraud, defect, or deceit therein. That, ever since the issuing and sale of said bonds, the city has regularly paid the interest thereon up to July, 1874, since which time the same has not been paid for want of funds. Wherefore, etc.

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The first, second and third paragraphs of the answer are similar to the fourth as stated above. Separate demurrers were filed to each paragraph and sustained by the court, and the injunction granted. Exceptions and appeal. Thus, the main question is presented by the third paragraph of the complaint and the fourth paragraph of the answer.

The single error assigned is sustaining the appellee's demurrers to the appellants' answer.

The constitutionality of section 60, 3 Ind. Stat. 93, under the authority of which the bonds in controversy were issued, must be held as settled. *Sankey v. The Terre Haute & S. W. R. R. Co.*, 42 Ind. 402. And bonds regularly issued and delivered by the authority of said section, in the hands of a *bona fide* holder, for a valuable consideration, without notice, must be regarded as public securities, and placed on a footing with bills of exchange. *City of Aurora v. West*, 22 Ind. 88; *Nugent v. The Supervisors*, 19 Wallace, 241; *Moran v. The Commissioners of Miami County*, 2 Black, 722; *Lee County v. Rogers*, 7 Wallace, 181; *Mercer County v. Hackett*, 1 Wallace, 83; *Rogers v. Burlington*, 3 Wallace, 654; *Clark v. The City of Janesville*, 10 Wis. 136; *The State, ex rel. Treadwell, v. Commissioners*, 12 Ohio St. 596; *New Albany, etc., Plank Road Co. v. Smith*, 23 Ind. 353; *Board of Commissioners v. Bright*, 18 Ind. 93.

In this case, no irregularity in the petition of the freeholders, nor in the order of the common council of the city of Mount Vernon, in making the donation, is shown; nor is it claimed that there is any irregularity in the consolidation of the railroads as alleged. But it is contended on behalf of the appellee:

"1. If the donation by delivery of city bonds had been actually made to the road petitioned for, it would have been a vested right, and would have passed under the act of February 23d, 1853 (1 G. & H. 526), to the road formed by the act of consolidation, as one of the vested rights of the Mount Vernon and Grayville Railroad Company. An examination of section 60, 3 Ind. Stat. 93, demonstrates that the legisla-

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ture intended, in conferring this power upon cities beyond the usual purposes of their incorporation, to limit its use to but two methods, one by contract on the part of the municipality in subscribing for stock in a railroad, the other by a gift or donation in money or bonds, by which cities might aid in constructing railroads without incurring any responsibility attaching to the position of a stockholder. That this choice was clearly intended by the act, is apparent, when we look back upon the many difficulties and embarrassments that had overtaken cities in this State as stockholders in railroads. It is evident that but one way of contracting is permitted by section 60, *supra*, that is, by taking stock, and that there is no intermediate state or condition between it and a donation in which a contract could be made.

"2. In the case at bar, the common council was authorized to donate under the restrictions named in the petition. Acting under that authority, it had only gone to the extent of making a bare proposition or tender binding upon nobody. This is sought to be avoided, in the fourth paragraph of the answer, by saying the Mount Vernon and Grayville Railroad Company accepted such proposal, and always treated it as assets on its books, endeavoring thereby to treat the donation as consummated. We submit that the transaction up to this stage was purely and simply a matter between the citizens and the council, the railroad company having no voice or interest in it; that the Mount Vernon and Grayville Railroad Company had no right, as against the city, which it could have enforced by *mandamus*, we have only to refer the court to the cases of *Board of Commissioners of Crawford County v. L., N. A. & St. L. Air Line R. W. Co.*, 39 Ind. 192; and *Sankey v. The T. H. & S. W. R. W. Co.*, 42 Ind. 402. In the latter case the court say the railroad company has no vested right until the donation is actually made. That the donation could not have been made in this case, we have only to remember it was to be made in city bonds, choses in action, which could not pass except by delivery, and that delivery was made to another and differ-

ent corporation than the one named in the petition and order, and after the demise of the company prayed for in the petition.

“3. It is seriously urged that the consolidation wrought no change in the original purpose for which the donation was made. We see a vast difference between the scheme before and after the consolidation. The people of Mount Vernon might be willing enough to aid by their revenues a road to be built entirely within their own county, but decline to embark in an enterprise several hundred miles in length, with the management transferred to a distant state, under different laws from their own, and their control of it gone. They were at least entitled to a voice in the matter, to say whether they would or would not consent to the new order of things, something that has never yet been afforded them.

“4. The question arises, could the Chicago and Illinois Southern Railroad Company, upon a demand and refusal by the common council to issue the bonds, have compelled by *mandamus* their issue? If it could not, then the council had no right to do what it could not have been compelled to do under the writ. The act of the council in making the issue was to disregard wholly the wishes of the taxpayers, and to bind them by a contract into which they never intended to enter.

“In *Harshman v. Bates Co.*, 3 Dillon C. C. 150, the history of the issue of the bonds is contained in the recitals on their face, which name the statute, the vote of the people, and the consolidation of the roads, as in the bonds in the case at bar, the two cases being identically alike, with the exception of one being a subscription, the other a donation. In the former case, the complaint set up almost the same facts pleaded in the appellants' answer, an innocent holder for value having purchased, without notice, etc. DILLON, J., held, upon the authority of *Marsh v. Fulton Co.*, 10 Wal. 676, *Clearwater v. Meredith*, 1 Wal. 25, *McMahan v. Morrison*, 16 Ind. 172, that the county, having authority by the proper vote to take stock

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in one railroad company, had no right without another vote to subscribe for stock in a consolidated company formed by the railroad voted for and another corporation, when the subscription had not been made to the original company, and that the consolidated company could not have enforced the subscription and issue of the bonds; and that notice of these facts appearing upon the face of the bonds, there could be no such thing as an innocent holder, but the purchaser took them with actual notice of the illegality, and stood in the same relation to them as the payee, the railroad company, to which they were issued. That case also supports the position we assume, that the constitutional provision requiring a vote, being the same as our statutes requiring a petition, is a condition precedent that cannot be dispensed with by the county agents, and that to neglect it when stock is taken in the consolidated road would be rendering this safeguard a nullity."

Whatever might be the difference, if any, between bonds issued as a donation, and bonds issued in payment of stock, before they are delivered, or while they remain in the hands of the donee, after they have passed into the hands of an innocent holder, for a valuable consideration, without notice, both classes of bonds would be equally binding. There was authority in law to issue the bonds—the purchaser had a right to presume that they were issued regularly. There was authority in law for the consolidation of the railroads—the purchaser had a right to presume that the consolidation had been regularly effected. Railroads escape none of their liabilities by consolidation, and, reciprocally, lose none of their rights. There is no act recited on the face of the bonds which had not the authority of law for its accomplishment; nothing to show that it was irregularly performed; no defect—nothing to awaken suspicion of their illegality. Such bonds in the hands of a *bona fide* holder must be held valid, whatever defects might have existed remediable between the donor and donee. *Nugent v. The Supervisors*, 19 Wallace, 241.

It is urged, that "the people of Mount Vernon might be willing enough to aid by their revenues a road to be built entirely within their own county, but decline to embark in an enterprise several hundred miles in length, with the management transferred to a distant state, under different laws from their own, and their control of it gone."

All of this may be very true; but the freeholders who petitioned the common council that passed the order, and the tax-payers of Mount Vernon, from whom the money was to be drawn, must be held to have known that the railroad to which they granted aid could legally effect the consolidation of which the appellee now complains. They must have known that the railroad lost none of its legal powers, and forfeited none of its rights, by accepting the donation. *Bish v. Johnson*, 21 Ind. 299; *Hanna v. The Cincinnati and Fort Wayne R. R. Co.*, 20 Ind. 30; *McMahan v. Morrison*, 16 Ind. 172; *Sparrow v. The Evansville and Crawfordsville R. R. Co.*, 7 Ind. 369.

The question whether the Chicago and Illinois Southern Railroad Company could have compelled the issue of the bonds by *mandamus* is not before us, and therefore not decided. After the delivery of the bonds, such a question is wholly immaterial.

It is conceded, on behalf of the appellee, that if the donation of the bonds had been actually made to the road petitioned for, it would have been a vested right, and would have passed to the road formed by the act of consolidation. If so, the bonds were not void, but at most only voidable. Admitting that they were voidable as between the donor and donee, having been delivered and passed into the hands of a *bona fide* holder, and recognized as binding by repeated payments of their interest coupons, it is now too late to question their validity. *Society for Savings v. The City of New London*, 29 Conn. 174; *The President, etc., of the Town of Keithsburg v. Frick*, 34 Ill. 405; *Board of Supervisors of Mercer Co. v. Hubbard*, 45 Ill. 139.

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We are of opinion that the court erred in sustaining the demurrers to the several paragraphs of the answer.

The judgment is reversed; the cause remanded, with directions to overrule the demurrers to the first, second, third and fourth paragraphs of answer, and for further proceedings according to this opinion.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The appellee presents his petition with marked ability and earnestness, and mainly relies for its support on the case of *Harshman v. Bates County*, recently decided by the Supreme Court of the United States. See 3 Dillon C. C. 150, and St. Louis Central Law Journal, June 9th, 1876, p. 367. The case may be briefly stated as follows:

The voters of Mount Pleasant township, Bates county, Missouri, in May, 1870, authorized the county court to subscribe ninety thousand dollars to the capital stock of "The Lexington, Chillicothe and Gulf Railroad Company."

In July, 1870, another corporation was formed, known as "The Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company."

In October, 1870, the two companies were consolidated, and became a corporation by the name of "The Lexington, Lake and Gulf Railroad."

In January, 1871, the county court, upon the supposed authority of the vote to "The Lexington, Chillicothe and Gulf Railroad Company," subscribed the ninety thousand dollars directly to "The Lexington, Lake and Gulf Railroad."

It will be plainly perceived that the two cases differ in their premises, in this: In the case cited, the citizens of Mount Pleasant township voted to authorize the county court of Bates county to subscribe stock to "The Lexington, Chillicothe and Gulf Railroad Company." This authority was never exercised, but after the consolidation of the road to

which the stock was voted with "The Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company," the two roads constituting "The Lexington, Lake and Gulf Railroad," the county court subscribed the stock, on the supposed authority of the original vote, directly to "The Lexington, Lake and Gulf Railroad," the new corporation. Here, there being no subscription to "The Lexington, Chillicothe and Gulf Railroad Company," hence that corporation could carry no obligation against the subscribers into the new consolidated company. In the case we are deciding, the citizens of Mount Vernon petitioned the common council to subscribe in their bonds to aid "The Mount Vernon and Grayville Railroad Company," and the order subscribing the bonds was accordingly made, before the road was consolidated with "The Grayville and Mattoon Railroad Company," the two roads thus becoming "The Chicago and Illinois Southern Railroad Company." "The Mount Vernon and Grayville Railroad" corporation therefore carried the obligation into the new consolidated company. True, the bonds were not issued until after the consolidation, but this is immaterial. They may be issued at any time the obligation requires, as the instalments may become due. A portion of them in this case, indeed, still remain to be issued. The obligation to issue the bonds to the new corporation, after the consolidation, is the same as it was to issue them to the company to which the aid was given before the consolidation.

It is not the bond that gives validity to the subscription, but the subscription that gives validity to the bond. And this difference runs throughout the decision cited, distinguishing it from a line of decisions which fully support the opinion pronounced in this case. The first sentence of the learned judge's opinion delivered on circuit, after stating the premises of the case, is as follows:

"This case contains an element not in the Cass county township bond cases decided at this term on demurrer, grow-

ing out of the fact that here the subscription was made after the vote was taken, to a new or consolidated company.”

He also points out a further distinction—that in the case he was deciding, the substantial facts were recited on the face of the bonds, and thus gave notice to all persons who dealt in them. And near the close of his opinion he distinctly states, that if the subscription had been made to the road to which it was voted before the consolidation, the bonds would have been valid. His language is as follows:

“But the case in hand is one where no subscription was ever made to the company to which it was voted; and it might be conceded, that if it had been actually made, the right to it would pass by operation of the statute to the new company, without the concession involving the consequence of a liability upon a subscription made for the first time after the new corporation was formed.”

This view of the case was approved by the Supreme Court of the United States.

The distinction taken in the case cited between a subscription to a railroad company made before consolidation, and a subscription to the new company after consolidation, by the same authority, proves the principle upon which the case before us is decided.

The petition for a rehearing is overruled.

BUSKIRK, J., dissents from the original opinion, and favors the granting of a rehearing.

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### THE STATE v. COOK.

CRIMINAL LAW.—*Forgery.—Indictment.*—An indictment for forging or for knowingly uttering a counterfeited instrument of writing must set forth an exact copy of the instrument.

SAME.—An indictment for forgery must show that the instrument of which the forgery is predicated is such on its face as is naturally calculated to

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have some effect, or, if that be not so, extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency.

SAME.—An indictment for forgery set out a copy of the instrument alleged to have been forged, as follows: “Trublood & Allen, Salem, Ind.: Please let Jim Cook” (the defendant) “have two dollars’ worth on my credit. Fred. L. Prow, Salem.”

*Held*, that this instrument, with the allegation that the drawees were in the grocery trade, did not support an averment in the indictment that it was “for the payment of money and delivery of grocery goods.”

SAME.—An allegation in an indictment that the defendant forged a certain instrument is inconsistent with a subsequent allegation that he then and there knew said instrument was then and there false, forged, etc.

From the Washington Circuit Court.

*S. B. Voyles*, Prosecuting Attorney, for the State.

*T. L. Collins* and *A. B. Collins*, for appellee.

BUSKIRK, J.—The appellee was indicted for forgery. The court below quashed the indictment. The State appeals, and assigns for error the quashal of the indictment. The indictment, omitting the formal parts, is as follows:

“1. The grand jurors within and for the county of Washington, and State of Indiana, present upon their oaths, that on the 3d day of May, A. D. 1875, at and within said county and State, Jim Cook did then and there unlawfully, feloniously and falsely forge and counterfeit a certain instrument in writing for the payment of money and delivery of grocery goods, which instrument in writing is in the words and figures following, to wit: ‘Trublood & Allen, Salem, Ind.: Please let Jim Cook have two dollars’ worth on my credit. Fred. L. Prow, Salem.’ He, the said Jim Cook, then and there well knowing the said instrument in writing was then and there false, forged and counterfeited as aforesaid, with the felonious intent to then and there defraud one Fred. L. Prow, contrary, etc. SAML. B. VOYLES, Pros. Att’y.

“2. The grand jurors within and for the county of Washington, and State of Indiana, upon their oaths present, that Jim Cook, on the 3d day of May, A. D. 1875, at said county and State, did then and there unlawfully, feloniously and falsely forge and counterfeit a certain instrument in writing

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for the payment of money and delivery of grocery goods, which instrument in writing was then and there, and still is, in the words and figures following: 'Trublood & Allen, Salem, Ind.: Please let Jim Cook have two dollars' worth on my credit. Fred L. Prow, Salem.' With the felonious intent to defraud Alva C. Trublood and Robert W. Allen, partners then and there in the grocery trade, contrary to the form of the statute in such cases made and provided, etc.

"SAML. B. VOYLES, Pros. Att'y."

By section 30 of the act defining felonies, 2 G. & H. 446, it is made a felony for any person to falsely and feloniously make or forge "any order or draft for the payment of money or property."

In an indictment for forgery, or of knowingly uttering counterfeit instruments of writing, the indictment must set forth an exact copy of the instrument. *The State v. Atkins*, 5 Blackf. 458; *McGinnis v. The State*, 24 Ind. 500; *Coppack v. The State*, 36 Ind. 513.

In the case last cited, it is said, that "in forgery it is held necessary to give the tenor of the instrument forged, in order that the court may see that it is one of those instruments, the false making or passing of which is punishable by law."

It is also settled that an indictment for forgery must show that the instrument of which the forgery is predicated is such, on its face, as is naturally calculated to have some effect; or, if that be not the case, then extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency. *Reed v. The State*, 28 Ind. 396; Wharton Am. Cr. Law, sec. 350, vol. 1, 6th ed.

In the present case, the instrument alleged to have been forged is set out, and it is averred generally that it was for the payment of money and the delivery of grocery goods. The instrument set out does not support the averment of the pleader. The instrument does not profess to be either for the payment of money or the delivery of grocery goods. The instrument, in legal effect, was a request on the part of

the drawer to the drawees that they should sell to the bearer something to the value of two dollars, and that the same should be charged to the drawer. In the first count, there is no averment as to the business in which Trublood and Allen are engaged, nor is there any averment in either count as to their manner of doing business, or as to the business relations between them and Mr. Prow. These averments are necessary to show the fraudulent tendency of the instrument. See authorities last cited.

There is a repugnancy between the former and latter portions of the first count, which leaves it in doubt whether any crime is charged. It is, in the first instance, charged that the defendant unlawfully, feloniously and falsely forged a certain instrument, etc. It is then averred, that "he, the said Jim Cook, then and there well knowing the said instrument was then and there false, forged and counterfeited as aforesaid," etc. The language last quoted is proper in an indictment for uttering a false and forged instrument as true, when the person knew it was false and forged, but is not proper in an indictment for forging an instrument. The last averment destroys the first. It charges the defendant with forging an instrument which he well knew was then and there false and forged. This would not be forgery. It is quite probable that the purpose of the pleader was to charge an uttering of the forged instrument, but the averments as they appear in the record are not sufficient for that purpose. Other objections are urged to the indictment, but it is not deemed necessary to consider them, as it was properly quashed for the reasons stated.

The judgment is affirmed, with costs.

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The Logansport, Crawfordsville and Southwestern Railway Co. v. Wray.

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THE LOGANSPORT, CRAWFORDSVILLE AND SOUTHWESTERN RAILWAY CO. v. WRAY.

**PLEADING.—Contract.—Motion for Judgment on Special Finding.**—Where a complaint upon a contract does not allege whether it was by parol or in writing, and no contract or copy thereof is filed with the complaint, it will be regarded as a parol contract. Where, in such case, there is a general verdict for the plaintiff, with a special finding that the contract was in writing, judgment should not be rendered for the defendant upon the special finding because of inconsistency thereof with the general verdict.

**DAMAGES.—Measure of.—Contract of Railroad Company to Erect Fences.**—Where a railroad company, in part consideration for the right of way over land, promised the land-owner to erect fences on each side of its railroad through said land, and to make cattle guards and farm crossings, the company was liable, upon its failure to perform such promise, to the cost of constructing such fences, etc., and it was not necessary, in order to recover such damages, that the fences, etc., should have been constructed by the plaintiff before bringing suit.

From the Montgomery Circuit Court.

*R. B. F. Peirce*, for appellant.

*J. M. Thompson* and *W. H. Thompson*, for appellee.

**DOWNEY, J.**—This was an action by the appellee against the appellant, to recover damages for the breach of a contract. The complaint is in four paragraphs. In the first it is alleged, in substance, that the said railroad was surveyed and located through the lands of the plaintiff, which are particularly described; that the company, by its engineer and president, entered into a verbal contract and agreement with the plaintiff that for the right of way it would pay the plaintiff sixty dollars per acre for the land appropriated; that under the contract the defendant took and appropriated four acres of the plaintiff's land; that it was further agreed that the defendant would build and construct a good and sufficient fence on each side of said railway across the plaintiff's land, and build and construct two good and sufficient farm crossings over the railway on said land. It is alleged that the defendant failed and refused to pay for said land, and to construct said fence and said crossings; wherefore the plain-

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tiff is damaged one thousand dollars; for which he demands judgment.

The second paragraph of the complaint does not state whether the contract was oral or written, and it does not state the number of roadways which the defendant was to construct across the railway. It alleges that the company took and appropriated five acres of the plaintiff's land. In other respects this paragraph is like the first.

The third paragraph of the complaint is upon a contract, whether in writing or not is not stated, by which, it is alleged, the defendant agreed, in part consideration of the right of way, to construct two good and sufficient farm road crossings and two good and sufficient cattle passes.

The fourth paragraph of the complaint alleges a purchase of the right of way by the defendant over the plaintiff's land, embracing five acres, and an agreement to pay for the same at sixty dollars per acre. It is not stated whether the contract was written or oral.

The defendant answered in two paragraphs. The first was a general denial. The second was as follows:

"And for a further answer herein, the defendant says that the said Wray has never at any time delivered to the defendant an instrument of conveyance to the right of way mentioned in his complaint, and has never tendered any such instrument to the defendant herein; wherefore," etc.

The plaintiff demurred to the second paragraph of the answer, and the demurrer was sustained. The demurrer is not in the record.

The trial was by a jury, and there was a general verdict for the plaintiff in the sum of six hundred dollars; also, the following:

"Was not the contract between the plaintiff and defendant concerning the defendant's right of way through the plaintiff's farm, mentioned and described in his complaint, reduced to writing and delivered to John Levas, president of said company?" Answer. "Yes."

The defendant moved the court for judgment in its favor,

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on the special finding, because the jury found that the contract for the right of way was reduced to writing by the parties at the time the contract was made. This motion was overruled by the court.

The defendant then moved the court for a new trial, which motion the court also overruled. Final judgment was rendered on the general verdict.

Errors are assigned as follows:

1. Sustaining the demurrer to the second paragraph of the answer.

2. Overruling the motion for judgment on the special finding.

3. Overruling the motion for a new trial.

The first alleged error, that is, the sustaining of the demurrer to the second paragraph of the answer, is not argued or urged by counsel for appellant, and therefore need not be considered.

In arguing the second position assumed in the assignment of errors, counsel urges that it must be presumed that the contracts referred to in the second, third and fourth paragraphs of the complaint, although nothing is alleged on that subject, were parol contracts, as well as that mentioned in the first paragraph, which is expressly stated to be a "verbal contract." We think this position is correct. The rule requires that when the contract on which the pleading is founded is in writing, the original or a copy of it must be filed with the pleading. As no contract or copy thereof is filed with the second, third or fourth paragraphs of the complaint, we must hold that the contract was by parol. *Lamb v. Donovan*, 19 Ind. 40. Other cases might be cited.

The next position assumed by the counsel, in arguing this assignment, is, that the special finding that the contract was in writing is so inconsistent with the general verdict, which finds, expressly, nothing as to whether it was or was not in writing, that judgment should have been rendered for the defendant on the special finding. In this view we cannot agree with the counsel. The writing was only evidence of

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the existence of the contract. It was, to be sure, higher and better evidence than parol evidence; but, if the parol evidence was not objected to, the contract might be established thereby as well as by the written evidence. The one is primary, and the other secondary. We think the objection that the contract was in writing, and not by parol merely, as shown in the complaint, to be available, should have been made at an earlier stage of the trial, and in a different mode from that adopted. There is no such inconsistency between the special finding and the general verdict as would require or justify the rendition of judgment on the special finding, rather than on the general verdict, according to 2 G. & H. 206, sec. 337.

Under the third assignment of errors, it is urged that the court, in the admission of evidence and in an instruction to the jury, adopted and acted upon a wrong theory as to the measure of damages. The charge given was as follows:

“If you find for the plaintiff, the measure of his damages should be arrived at by computing the cost of constructing the fences on both sides of the railroad across plaintiff's farm, the cost of putting in two cattle guards and two farm crossings, and sixty dollars per acre for the land taken as right of way by defendant.”

Counsel for appellant refers us to *The Indiana Central R. W. Co. v. Moore*, 23 Ind. 14, as an authority in opposition to the law as laid down by the circuit court. We do not think the case decisive of the question. In that case the action was to recover damages against the company for failing to make certain cow-pits, and it appeared from the evidence that the company had constructed the pits, but in a defective manner. Yet the court found that the measure of damages was the amount that it would have cost to construct, etc., the pits. This court was of the opinion that this was wrong, for the reason that the evidence showed that the pits had been built, though in a defective manner, and kept in repair by the company, and that the plaintiff was entitled to recover for the defects and nothing more. The plaintiff, in

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the case under consideration, having performed his part of the contract, and the defendant having taken possession of the land of the plaintiff, and being in the enjoyment and use of the same, but having failed to pay for the land at the price agreed upon, and to construct the fences, etc., as agreed, it seems to us that the rule laid down by the court, as to the measure of damages, is correct. The position assumed by counsel, that the plaintiff, in such a case, cannot recover unless he has done the acts which the defendant agreed to do, cannot be correct. Suppose the defendant has agreed to erect a house for the plaintiff, has received the consideration for which he agreed to do the work, but failed to perform the contract on his part, and the plaintiff seeks to recover damages for the breach of the contract, is it the law that he cannot recover unless he has himself first erected the house? We think not. There is no question as to so much of the charge as relates to the price of the land taken, and we think there is no valid objection to any part of it. In *Lawton v. The Fitchburg R. R. Co.*, 8 Cush. 230, the point in question was ruled in accordance with the views above expressed. The company, in consideration of an amicable settlement of the damages of the land-owner for right of way, agreed with him to fence the land taken, and, failing to do so in a reasonable time, was sued by him for the breach of the agreement. It was held that the measure of damages was the sum which it would fairly cost to erect the fences according to the agreement.

In *The Chicago and Rock Island R. R. Co. v. Ward*, 16 Ill. 522, the court went further, and held the company liable for crops destroyed for want of the fence. The court said: "If the breach be in a failure to make repairs or perform labor, the rule of damages will give the cost of the repairs, or what will hire the labor," etc.

The judgment is affirmed, with five per cent. damages and costs.

Opinion filed November term, 1875; petition for a rehearing overruled May term, 1876.

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Tyler v. Kent.

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## TYLER v. KENT.

**PLEADING.—***Statute of Another State.—Judicial Notice.*—The courts of this State cannot take judicial notice of the statutes of another state, and where a cause of action is founded on a statute of another state, such statute must be set out by filing a copy thereof with the complaint.

From the Warren Circuit Court.

*G. O. Behm, J. Park and A. O. Behm*, for appellant.

*J. McCabe*, for appellee.

**BUSKIRK, J.**—The first question presented for our examination and decision is, whether the court erred in overruling demurrers to the first and second paragraphs of the complaint.

The first paragraph alleges, in substance, that the defendant is indebted to the plaintiff for use, occupation, rents and profits of certain described real estate in the State of Illinois, in the sum of thirty-six hundred dollars; that the defendant was in the possession of said premises on the 23d day of December, 1871, when the plaintiff became the purchaser, under a decree of foreclosure, of the premises aforesaid, and continued to occupy the same continuously for two years thereafter; that on the 25th day of March, 1873, in pursuance of said sale, the master commissioner made and delivered to the plaintiff, as such purchaser, under the authority of the Circuit Court of Vermillion county, in the State of Illinois, where said land is situated, a deed for said land, the same not having been redeemed; and that under a statute of the State of Illinois, a copy of which is filed with and made a part thereof, the defendant is liable to pay to the purchaser the full rental value of said premises from the date of the purchase until the deed is made, if the same was occupied by such defendant and was not redeemed as provided by the laws of said State.

In the second paragraph it is alleged, in substance, that the plaintiff, on the 23d day of December, 1871, became the

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purchaser at a foreclosure sale by a master in chancery, under a decree of the Circuit Court of Vermillion county, in the State of Illinois, of certain described real estate; that under the statute of that state the plaintiff was not entitled to the possession of the said premises until a deed was executed, which could not be made until the time for redeeming the same had expired; that said premises were not redeemed; that on the 25th day of March, 1873, a deed was executed to the plaintiff, when he became the owner of the same in fee simple; that the said defendant treated and used the said premises in such a negligent and unskilful manner that they became greatly damaged, *i. e.*, in turning large herds of cattle, horses, and hogs into the fields and meadows, when the ground was soft and thawed, to the great destruction of the grasses and almost irreparable injury to the plow land in making it hard and untillable; by means of which the plaintiff is damaged in the sum of fifteen hundred dollars, for which sum a judgment is demanded, together with all other proper relief.

The statute of Illinois referred to and made a part of the first paragraph reads as follows:

“In all cases in which rent may be due and in arrear, on a lease for life or lives, and where lands shall be held and occupied by any person without any special agreement for rent, it shall and may be lawful for the owner or owners of such lands, or his, her or their executors or administrators, to sue for and recover such rent, or a fair and reasonable satisfaction for such use and occupation, by action of debt or assumpsit, in any court having jurisdiction thereof.” Gross’ Statutes, 412, sec. 1.

The right of the plaintiff to recover in this action depends upon the statute of the State of Illinois. It is averred that the appellee purchased the lands in question at a judicial sale in that state; that the appellant was in possession thereof at the time of such sale, and continued to occupy the same until a deed was made; that under and by virtue of a stat-

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ute of that state, a copy of which was said to be, but was not, filed therewith, the defendant was liable to pay to the plaintiff the full rental value of such premises from the date of the purchase until the deed was made. No such statute is in the record. We cannot take judicial notice of the statutes of another state. A person who claims to recover under the laws of another state must aver his rights under such laws, and should set forth such laws, so as to enable the court to determine whether such person is entitled to the relief demanded. *Irving v. M'Lean*, 4 Blackf. 52; *Buskirk's Practice*, 23.

The statute of Illinois filed with the complaint gives to the owner or his personal representatives the right, under certain circumstances, by an action of debt or assumpsit, to recover rent. It does not define when and under what circumstances rent shall be due, but simply gives a remedy when rent is due. The appellee has no right of action in this State, unless it is given by the laws of Illinois. He alleges the existence of such statute, but does not set it forth. His action is founded upon such statute, and a copy thereof should have been filed with the complaint. The sufficiency of several paragraphs of the answer depend upon such statute of the State of Illinois. The court should have sustained the demurrer to the complaint for the failure to file therewith a copy of the statute upon which the action is founded. Counsel for appellee relies upon *Wills v. Wills*, 34 Ind. 106, and *Johnson v. Kilgore*, 39 Ind. 147. They have no application to a case like this, which is founded upon the statute of another state, for in such case a general averment of indebtedness is not sufficient.

The judgment is reversed, with costs; and the cause is remanded, with instructions to the court below to sustain the demurrer to the complaint.

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Nichol, Adm'r, v. McCalister.

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## NICHOL, ADM'R, v. MCCALISTER.

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DEMURRER.—*Joint Demurrer*.—Where there is a joint demurrer filed to several paragraphs of an answer, if one paragraph be good, the demurrer should be overruled as to all.

DEPOSITION.—*Secondary Evidence*.—A motion to suppress, in a deposition, parol evidence of the contents of a record, for the introduction of which a proper foundation has not been laid, should be held under advisement until the trial; and if secondary evidence be not rendered admissible, such parol evidence should be excluded.

EVIDENCE.—*Proof of Sheriff's Sale*.—On the trial of an action for the breach of the covenants in a deed of conveyance of land executed by the defendant to the plaintiff, the latter founding his claim for damages on a previous sale of the land to a third person by the sheriff, the deed of the sheriff may be introduced in evidence as a link in the chain of title; but it is not sufficient of itself to prove the sale, without also the judgment and execution.

From the Madison Circuit Court.

*M. S. Robinson and J. W. Lovett*, for appellant.

*J. H. McConnell and H. D. Thompson*, for appellee.

BUSKIRK, J.—This was an action by the appellee against Alfred Makepeace, for damages resulting from breach of the covenants in a deed. During the pendency of the action Makepeace died, and the appellant was substituted.

A demurrer to the complaint was overruled, and this has been assigned for error, but is abandoned in the brief of counsel for appellant.

The appellant answered in seven paragraphs. The appellee demurred jointly to the second, third, fourth, fifth, sixth and seventh paragraphs, which demurrer was overruled to the third and sustained to the others. The third paragraph is confessedly good. The demurrer being joint as to the paragraphs, and one of them being good, the demurrer should have been overruled as to all of the paragraphs. Buskirk's Practice, 193, 194, and authorities cited.

The court also erred in overruling the motion for a new trial. The motion to suppress the deposition of Jonathan

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Nichol, Adm'r, v. McCalister.

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V. Bowman was properly overruled. The motion to suppress the fourth question and answer of the deposition of Samuel I. Carter should have been held under advisement until the trial, and if secondary evidence was not rendered admissible, the evidence should have been excluded. *The B. & O. R. R. Co. v. McWhinney*, 36 Ind. 436; *Gimbel v. Hufford*, 46 Ind. 125; *The I., P. & C. R. W. Co. v. Anthony*, 43 Ind. 183.

The evidence was secondary. Mr. Carter testified that he had, as sheriff of Coffey county, Kansas, and by virtue of a certain execution, sold the land in question to Stephen Harland, and that he executed a deed to the purchaser. The contents of a record cannot be proved by parol, without laying the proper foundation for the admission of secondary evidence.

The finding is not sustained by the evidence. The appellee sought to recover upon the ground that the real estate sold and conveyed by Makepeace to the appellee had been sold by the sheriff of Coffey county, in the State of Kansas, to Stephen Harland. For the purpose of proving such sale, the appellee introduced in evidence the deed of the sheriff of Coffey county, Kansas. The deed was properly admitted, as it constituted a link in the chain of the title, but it was not sufficient of itself to prove such sale. The appellee should have introduced the judgment, execution and sheriff's deed. This is firmly settled by repeated decisions of this court. *Splahn v. Gillespie*, 48 Ind. 397, and authorities there cited.

The court should have granted a new trial.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

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## TAYLOR v. ELLIOTT ET AL.

PRACTICE.—*Supreme Court.*—*Appeal in Name of Deceased Party.*—*Motion to Set Aside Judgment After Term.*—*Assignment During Pendency of Action.*—

After the death of the plaintiff in an action, an appeal was taken to the Supreme Court from a judgment rendered against him in said action, error being assigned by counsel in the name of said plaintiff, and a joinder in error being filed in behalf of the defendant by counsel, and there was judgment of reversal and for costs in favor of said plaintiff, the counsel who assigned error and the defendant and his counsel being ignorant of the death of said plaintiff until after the rendition of said judgment of reversal.

*Held*, that if said judgment of reversal was not void, the Supreme Court never having acquired jurisdiction of said plaintiff, it was erroneous in fact and voidable, and, whether void or voidable, it ought to be set aside upon motion of the defendant, though such motion was not filed until after the expiration of the term at which said judgment of reversal was rendered.

*Held*, also, that said appeal could not be prosecuted in the name of said plaintiff by one to whom, during the pendency of the action in the court below, the plaintiff had made a written assignment of the cause of action.

SAME.—*Construction of Statute.*—The provision of section 21 of the code, 2 G. & H. 51, that, in case of any transfer of interest, other than such as arises from the death, marriage or other disability of a party, "the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action," means that when such transfer of interest is made, the action may be continued in the name of the original party if he be living, but does not mean that it may be continued in his name after he is dead.

From the Marion Civil Circuit Court.

J. A. Holman, for appellant.

N. B. Taylor, F. Rand and E. Taylor, for appellees.

WORDEN, J.—Quartus Taylor brought an action in the Marion Civil Circuit Court against Calvin A. Elliott and another, in which a demurrer was sustained to the complaint, and final judgment rendered against the plaintiff therein, said Taylor. Afterwards, on May 14th, 1874, a transcript of the proceedings and judgment in that cause was filed in this court, and errors assigned thereon by counsel, in the name of said Taylor as appellant, and there was a

52	588
183	216
52	588
140	40

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joinder in error on behalf of Elliott by counsel. The cause progressed to a final hearing in this court under this assignment of error, and there was a judgment of reversal and for costs in favor of said Taylor entered by this court at the November term thereof, 1875. The case will be found reported in 51 Ind. 375.

On June 8th, 1876, Elliott filed his petition in this court, praying that the judgment of reversal in favor of said Taylor be set aside and held for naught, on the ground that said Taylor had departed this life before any appeal had been taken to this court. It appeared upon the hearing of the petition that Taylor died on May 1st, 1873, but his death was unknown to counsel who assigned errors in his behalf, and to Elliott and his counsel, until after the decision of the cause by this court. It was shown by Deborah B. Taylor that said Quartus Taylor, while the action was pending in the court below, had made a written assignment of the cause of action to her. The question arises whether, under these circumstances, the judgment of reversal heretofore entered by this court should be set aside. The question, in our opinion, admits of nothing but an affirmative answer.

This court never acquired any jurisdiction of Taylor, he having died more than a year before the appeal was taken to this court, and the judgment in his favor would seem to have been void.

There is some conflict in the decisions upon the point whether a judgment in such case is void or voidable only. Thus, in *Spalding, Administrator, etc., v. Wathen*, 7 Bush, 659, it was held that where an appeal was prosecuted in the name of a dead plaintiff, and there was judgment of reversal, the judgment was not void, the question arising collaterally. On the other hand, there are cases holding that where the plaintiff is alive at the commencement of the action, but dies during the pendency thereof, a judgment subsequently rendered in his favor is a nullity. In *Freeman on Judgments*, sec. 153, it is said, as a reason for holding judgments not void, where the parties are alive at the

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commencement of the action, but one of them dies before judgment, that "this is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*."

The same author, in the same section, further remarks, that "there are, nevertheless, quite a number of cases in which judgments rendered for or against a person then deceased, but over whom in his lifetime the court had jurisdiction, have been declared void." For future convenience, we append the following list of cases, in addition to that already cited, bearing closely upon the point: *Case v. Ribelin*, 1 J. J. Marsh. 29; *Collins v. Mitchell*, 5 Florida, 364; *Carter v. Carriger's Adm'r*, 3 Yerg. 411; *Ewald v. Corbett*, 32 Cal. 493; *Coleman v. McAnulty*, 16 Mo. 173; *Yaple v. Titus*, 41 Penn. St. 195; *Carr v. Townsend's Ex'rs*, 63 Penn. St. 202; *Parker v. Horne*, 38 Miss. 215; *Young v. Pickens*, 45 Miss. 553; *New Orleans, etc., R. R. Co. v. Bosworth*, 8 La. An. 80; *Norton v. Jamison*, 23 La. An. 102; *Loring v. Folger*, 7 Gray, 505; *McCreery v. Everding*, 44 Cal. 286.

The last case we cite from a reference, the volume not being within our reach. Freeman says of it, at the section above cited, that though made without any apparent consideration of the authorities upon the subject, the decision makes it clear that the Supreme Court deem a judgment rendered in favor of a dead man to be a mere nullity.

We are inclined to the opinion that the judgment of this court in this case in favor of Taylor, reversing the judgment below, was a nullity, inasmuch as this court never had any jurisdiction over him. He was dead before the appeal was taken. Suppose the judgment below had been affirmed, instead of having been reversed; we do not see how the

affirmance could have prevented the administrator of Taylor from prosecuting an appeal of the case to this court.

But whether the judgment of reversal was void, or simply erroneous in fact and voidable, it ought to be set aside and vacated. There is no conflict in the authorities upon this point.

This would have been accomplished, at common law, by the writ of error *coram nobis*. "If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court, by writ of error *coram nobis*, or *quæ coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment." 2 Tidd's Prac. 1136-7.

We quote the following passages from Freeman on Judgments, sec. 94:

"If, however, the proceedings are based upon facts presumed by the court to exist, as when one of the parties is insane, or is an infant, or a *femme covert*, or has died before verdict, and the court, supposing such party to be alive and competent to appear as a litigant, renders judgment, it may be set aside by writ of" (error) "*coram nobis*. \* \* \* The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without fault or negligence of the party, was not presented to the court."

But the writ, in practice, has fallen, in a great measure, into desuetude, and the courts now furnish the same remedy by motion that was formerly afforded by the writ. Powell on Appellate Proceed. 324, sec. 47. By our statute

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writs of error are abolished. 2 G. & H. 269, sec. 550. The petitioner has pursued a proper remedy.

But it is urged that this court cannot set aside its judgment after the term at which it was rendered. We have seen that a remedy in such case was afforded at common law by the writ above mentioned, and that now the remedy may be had on motion. But the writ might have been issued at any time within twenty years after judgment, when it was barred by the statute of limitations. 2 Tidd's Prac. 1141.

If the remedy can be had on motion, it is not easy to see why it may not be had within the same time limited for the issuing of the writ. Until the expiration of the term at which judgment was rendered, there was no necessity for such writ; for until the expiration of the term the courts could modify or set aside their judgments without it. Freeman on Judgments, sec. 90.

As judgments could have been reversed and set aside by the writ after the term, and as now the same remedy may be had in a proper case on motion, it seems to follow conclusively that they may be set aside in such case, on motion, after the expiration of the term. It seems to us, also, on general principles, that courts must have power, in such case, to set aside its judgments after the term at which they are rendered. If they cannot, in such cases, it is difficult to conceive cases in which they can.

In *Hallett v. Richters*, 13 How. Prac. 43, the court set aside a judgment for the want of sufficient notice to the defendant after the lapse of a year from the rendition of the judgment. The court say:

"The remaining question is, whether the court should set aside a judgment after the lapse of one year, upon motion, for want of jurisdiction. The power of the court to do so, I think, cannot be doubted. The only limitation upon its control over its judgments is the statute, which forbids us to set aside judgments for irregularity after one year; but this does not apply to questions of right or substance."

In *Huntington v. Finch*, 3 Ohio St. 445-8, it was held to

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be well settled in that state that a judgment may be vacated or set aside, on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. This case goes much further than we need to go in the case before us. In the case before us there has been no improper conduct, but there was a more fatal defect, there was no appellant in whose favor a judgment of reversal could be rendered.

In *Foreman v. Carter*, 9 Kan. 674, it was held that a void judgment might be set aside at any time on motion of the defendant.

In *Harris v. Hardeman*, 14 How. 334, a judgment was rendered against a defendant by default without due service of process, and was set aside at a subsequent term. Held correct.

In *Capen v. Inhabitants of Stoughton*, 16 Gray, 364, a judgment was set aside at a term subsequent to that of its rendition, because the jury rendering the verdict had, by mistake, put the wrong verdict into an envelope and returned it into court.

In *Edson v. Edson*, 108 Mass. 590, it was held that the court had the power, upon the petition of the party aggrieved, to vacate a decree of divorce, obtained at a former term against the petitioner by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the other party, and of which the court had only an apparent jurisdiction, founded on his false allegations of domicile. See, also, *The Board of Commissioners of Huntington County v. Brown*, 14 Ind. 191.

There are other cases running through the books that would illustrate this subject, but we deem it unnecessary to bring more of them together.

It is claimed, on behalf of Deborah B. Taylor, that, as she had an assignment of the cause of action from Quartus Taylor, she could prosecute the appeal in his name, notwithstanding his death. This claim is founded on the latter part of the

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twenty-first section of the code, 2 G. & H. 51, which provides that in case of any transfer of interest, other than such as arises from death, marriage, or other disability of a party, "the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." This, however, must be construed to mean that when such transfer of interest is made, the action may be continued in the name of the original party, if he be living. It was evidently not the intention of the legislature that the action might be continued in his name after he was dead.

For these reasons, we are of opinion that the prayer of the petition must be granted.

It will therefore be ordered and adjudged by the court that the judgment of reversal and for costs, heretofore rendered in said cause, be set aside, vacated, annulled and held for nought as if the same had never been pronounced or entered.

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NOTE.—DOWNEY, C. J., did not sit on the hearing of this petition.

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### BABER v. RICKART ET AL.

**EVIDENCE.—Admissibility.—Warranty.**—Where, upon the trial of an action, the question in issue was whether a certain ditching machine sold with warranty by the plaintiff to the defendant would perform in a certain manner, at a certain place, as specified in the warranty, evidence as to the manner in which it performed at a certain place in another state was competent, as tending to prove its capacity at the place specified in the warranty.

**DEPOSITION.—Commission.**—Where a deposition purports to have been taken before, and to be certified by, an officer in another state, and the record does not set forth a commission, or show that one was issued, such deposition cannot be used in evidence in this State.

**SAME.—Authentication.**—Where a deposition, purporting to have been taken before a justice of the peace of another state, is authenticated only by the certificate of said justice, and there is in the record no commission containing the name of the officer before whom the deposition was to be

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taken, the deposition will be suppressed on motion, or excluded, for want of authentication.

SAME.—If there be in the record a commission naming the officer before whom the deposition is to be taken, such certificate of the officer will be sufficient, but if there be a commission which does not name the officer, and the officer by whom the deposition is certified have no seal, his certificate must be authenticated by the certificate and seal of the clerk or prothonotary of a court of record of the county in which said officer exercises the duties of his office.

SAME.—*Justice of the Peace of Another State.*—A justice of the peace of another state cannot be allowed, in a court of this State, to correct his certificate to a deposition purporting to have been taken in said other state.

From the Warren Circuit Court.

*J. McCabe*, for appellant.

*W. P. Rhodes* and *M. Milford*, for appellees.

BUSKIRK, J.—The appellees sued the appellant upon two promissory notes. The appellant answered that the notes were given for and in consideration of the right to make, use and vend a certain patented ditching machine, within certain prescribed limits; that the appellees warranted that said machine would do certain work; that upon a proper test the said machine had utterly failed to perform as warranted; and that such machine was utterly worthless. Reply in denial, trial, verdict and judgment for plaintiffs.

A new trial was asked, upon the grounds that the court had erred in overruling a motion to suppress the depositions of Hoover, Cole, and Lope, and in permitting said depositions to be read in evidence, over the objection and exception of appellant. These questions are presented by the bill of exceptions as follows:

“Be it remembered that, at the proper time, the defendant moved the court to suppress the depositions of James Hoover, William Cole and Zachariah Lope, on the ground that the questions and answers of the said witnesses were not pertinent to the issues in the said cause, and on the further ground that the certificate of the officer before whom said depositions purported to be taken was defective, in this, that it was unauthenticated, and that said certificate did not state

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the time and place of taking said depositions with sufficient certainty; and thereupon the plaintiff moved the court for leave to amend said certificate, and produced immediately in open court —, the justice of the peace who had certified the said depositions, and the plaintiff's attorney, with the permission of the court, over the objection of the defendant, interlined the said certificate to said deposition, in one place the words 'Newell township' in, which words appear in parenthesis and after the words 'at my office in' and before the words 'the county,' and in another place after the words 'said day' and before the words 'in testimony' interlined the words 'agreeably in all respects with the requirements of the inclosed notice herein,' which latter words are also included in parenthesis in said certificate; and said attorney thereupon erased the name of Jas. S. Johnson from the bottom of said certificate, and the aforesaid person, the said justice, was then, with like permission of the court, over the objection of the defendant, allowed to sign his name of Jas. S. Johnson to said certificate; to all of which rulings the defendant at the time excepted; and said depositions, with the amendments as aforesaid to the certificate thereto attached, appear hereinafter at full length, to which reference is had; and the court thereupon overruled defendant's motion to suppress said depositions, to which ruling of the court the defendant at the time excepted."

Upon the trial, the defendant objected to the reading of said depositions, as appears from the bill of exceptions:

"And the plaintiff offered to read the aforesaid depositions of James Hoover, William Cole and Zachariah Lope; to the reading of which the defendant objected, on the ground that the court had erred in allowing the certificate attached thereto to be amended as above specified, and because said certificate was void, being unauthenticated, vague and uncertain as to the time and place of taking said depositions, and because said depositions were irrelevant to the issues and incompetent evidence, but the court overruled said objection and allowed said depositions to be read in evidence; to

which ruling the defendant at the time excepted, and said depositions read as follows."

The warranty was, that the machine would do a certain amount and quality of work in Madison county, Ohio. The appellant offered evidence tending to prove a breach of warranty in Madison county, Ohio. The plaintiffs, by the depositions in question, sought to prove the quantity and quality of work done by said machine, or rather, by machines of the same pattern and construction, in Vermillion county, in the State of Illinois, and the question arises whether such evidence was competent and material. The fact to be proved was, whether the machine performed in the manner and place specified in the warranty. Evidence as to the manner in which such machine performed at another place would tend to prove the capacity of the machine to perform at the place specified in the warranty. The weight of such evidence would greatly depend upon the difference in the soil and the other surroundings of the two places. Such a machine might perform well in one character of soil, and yet would fail in another and different character of soil. Evidence ought not to be excluded because it is entitled to but little consideration and weight. The difference between the competency and weight of evidence is marked and clearly defined. That which is competent, whether weak or strong, should be admitted. That which is incompetent, no matter how convincing, should be excluded. Evidence which tends to prove some fact in issue is admissible. *Denman v. McMahan*, 37 Ind. 241. The court determines the competency of evidence, and the jury considers and weighs it and gives it such weight as it is entitled to. We think the evidence was competent.

The depositions in question purport to have been taken before and certified by a justice of the peace in the State of Illinois. There is no commission in the record and no evidence that any was issued. A commission is imperative when a deposition is taken without the State; and without such commission, such non-resident officer has no authority

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to take the deposition. *The M., I. & P. R. R. Co. v. Whitesel*, 11 Ind. 55; *Boggs v. The State*, 8 Ind. 463.

The depositions are authenticated only by the certificate of the justice before whom they were taken. This would be sufficient, if a commission was issued which contained the name of the officer before whom the deposition was to be taken; but if the commission does not specify the name of the officer, and he has no official seal, his certificate shall be authenticated by the certificate and seal of the clerk or prothonotary of any court of record of the county in which the officer exercises the duties of his office. Sec. 261, 2 G. & H. 177; *Hobbs v. Godlove*, 17 Ind. 359. But it is claimed by counsel for appellees, that the question of authentication is not before us, because the commission is not in the record, and that we cannot determine whether it contained the name of the officer before whom the depositions were to be taken.

The appellant moved to suppress, and objected to the reading of the depositions in evidence, upon the ground, among others, that they were unauthenticated. As the depositions appear in the record, they are unauthenticated. If there was a commission which named the officer, it should be in the record. We have to decide the case from the record, as it appears before us. As it stands, there was no authentication. The certificate of the justice, conceding that he was named in the commission, was defective. The justice possessed no power to amend his certificate in this State. His power and authority were conferred by the constitution and laws of Illinois. They could only be exercised within that State. His authority is recognized in this State when authenticated in the manner prescribed by our statute; that is to say, his certificate is sufficient if he was named in the commission, and if not so named, then it must be authenticated by the seal of the clerk or prothonotary of the county where he exercises his office.

Justices of the peace possess no common law jurisdiction. Their powers are conferred and defined by statute. They

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possess no extra-territorial jurisdiction. The courts of this State cannot take judicial notice of the laws of another State. *Hawkins v. The State*, 24 Ind. 288; *Caffrey v. Dudgeon*, 38 Ind. 512, and authorities cited. By the laws of this State, a justice of the peace of another state is empowered, within his jurisdiction, to take and certify depositions; but we know of no statute or practice which will authorize a justice of the peace of another state to come into this State and exercise the functions of his office.

The judgment is reversed, with costs; and the cause is remanded for a new trial.

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127	307
52	540
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0161	235

## MOHAN v. JACKSON.

CONSTITUTIONAL LAW.—*Judicial Office.—Justice of the Peace.—City Clerk.—*

The office of city clerk is not an office "under the State," within the meaning of section 16, article 7, of the constitution of Indiana; and one who has been elected to the office of justice of the peace, and has qualified and entered upon the duties of said office, is not ineligible to the office of city clerk during the term for which he was elected justice of the peace.

From the Madison Circuit Court.

*H. D. Thompson*, for appellant.

*M. S. Robinson* and *J. W. Lovett*, for appellee.

DOWNEY, C. J.—This was an information by Mohan against Jackson, which, on motion of the defendant, was quashed, because it did not state facts sufficient to constitute a cause of action.

It appears that on the 11th day of October, 1870, Jackson was elected to the office of justice of the peace, and that he afterwards qualified as such, and entered upon the discharge of the duties of such office. On the 5th of May, 1874, he was elected to the office of city clerk of the city of Anderson, and he qualified and assumed the discharge of the duties of that office. Mohan was, at the same election, a candidate

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for said office of city clerk, but received a less number of votes than Jackson. Mohan filed the information in this case to test the question whether or not Jackson was entitled to hold the office of city clerk.

It is claimed that the office of justice of the peace is a judicial office, and that when Jackson was elected to and accepted it, he was not eligible to the office of city clerk during the term for which he was elected justice of the peace.

The question turns upon the proper construction of section 16, article 7, of the constitution of the State. It reads as follows:

“No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the State, other than a judicial office.”

We are of the opinion that the office of city clerk is not an office “under the State,” within the meaning of this section. *The State v. Kirk*, 44 Ind. 401.

The question here is one of eligibility, and not one of incompatibility of offices. When the offices are merely incompatible, the acceptance of the second vacates the first or former. *Howard v. Shoemaker*, 35 Ind. 111, and cases cited.

The judgment is affirmed. with costs.

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## CITY.

See CONSTITUTIONAL LAW; SCHOOL CORPORATION.

1. *Ordinance. — Signature of Mayor. — Street Improvement.*—The signature of the mayor of a city incorporated under the general law for the incorporation of cities in this State is not essential to the validity of an ordinance of such city, and, therefore, the fact that an ordinance of such city, under which a street improvement has been made, had not been signed by the mayor at the time the contract for the making of such improvement was let, does not render invalid an assessment against property for such improvement. *Martindale v. Palmer, 411*
2. *Same.*—An ordinance of a city providing for a street improvement is not rendered void for uncertainty by the fact that it is necessary to take together the title and the body of the ordinance referring to the title, to ascertain with certainty what street or part of a street is to be improved. *Ib.*
3. *Same. — Contract. — Kind of Improvement.*—An ordinance providing for a street improvement in a city directed that the street should be paved with "Nicholson or wooden block pavement," and the contract was for "what is known as wooden block pavement."  
*Held*, that it was not necessary that the contract should literally follow the ordinance, it being sufficient that the pavement contracted for corresponded in kind with that provided for in the ordinance. *Ib.*
4. *Appeal from Precept. — Advertisement.*—On an appeal from a precept issued to collect the amount of an assessment against property for a street improvement, the insufficiency of the advertisement to receive proposals to do the work cannot be inquired into as a fact. *Ib.*
5. *Precept. — Sale of Several Lots Together.*—A precept was issued, upon regular affidavits, for the collection of a certain sum in gross, being the amount of assessments properly made on two lots in a city, owned by one person, for a street improvement, and in default of payment the precept commanded the sale of both lots, without distinguishing the separate amounts due on each lot, and without requiring each lot to be sold separately to pay its own assessment.

*Held*, on appeal from the precept, that it was not void, but only voidable, and could have been amended by the assessments and affidavits, and that a sale of both lots thereunder without objection would have been good. *Id.*

6. *Appeal from Precept.—Answer.—Nul Tiel Record.*—On an appeal from a precept issued on an assessment for a street improvement, an answer of *nul tiel record* cannot put in issue any fact which preceded the contract. *Id.*

7. *Sewer.—Insufficiency of Public Sewer for Private Use.*—A city, incorporated under the general law for the incorporation of cities in this State, by its contractor, and under and in accordance with an ordinance of the common council, constructed a sewer along a street of said city, one-half of the cost of which was assessed against and paid by the owners of the real estate abutting upon said street. Said sewer not being of sufficient capacity to carry off the sewerage that was drained into it during hard rains of ordinary occurrence, one of said owners, under and in compliance with a permit obtained by him of said city in accordance with an ordinance thereof, tapped said sewer and connected therewith his premises abutting on said street, paying said city a certain sum for said privilege. By reason of said insufficiency in the capacity of the sewer, the basement of said owner's house was subject to frequent overflows from the backwater of said sewer through the connecting pipe, and by such overflows said premises were injured, which injury could be avoided only by the closing and disuse of said connecting pipe, thereby diminishing the rental value of said premises.

*Held*, that the tenant of said owner, during whose tenancy such injury occurred, and who, at the time he became a tenant, had no knowledge of such insufficiency of the capacity of the sewer, had no cause of action against the city. *Roll et al. v. The City of Indianapolis, 547*

8. *Liability of Municipal Corporation.*—Municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby, or for the exercise of their ordaining powers, however mistaken or corrupt their policy may be, and although private injury may result therefrom. They are liable to individuals for wrongful acts or derelictions of duty in the exercise of their ministerial powers, whenever injury to private rights is the direct and natural consequence; and, when liable, they are liable the same as individuals would be under the same circumstances. *Id.*

9. *Bonds Donated to Railroad.—Bona Fide Holder.*—It is settled that section 60 of the general law of March 14th, 1867, for the incorporation of cities in this State (3 Ind. Stat. 93), providing that cities incorporated under said act have power to borrow money to subscribe to the stock of any plank road, macadamized road or railroad running into or through such city, to make donations in money or the bonds of such city to aid in the construction of such roads, on petition of a majority of the resident freeholders thereof, etc., is constitutional; and bonds regularly issued and delivered by the authority of said section, in the hands of a *bona fide* holder, for a valuable consideration, without notice, must be regarded as public securities and placed on a footing with bills of exchange. *The City of Mt. Vernon et al. v. Hovey, 563*

10. *Same.—Consolidation of Railroads After Order of Donation and Before Issue of Bonds.—Injunction.*—The common council of a city incorporated under the general law for the incorporation of cities in this State, upon petition of a majority of the resident freeholders of the city, made an order for the donation of a certain amount in the bonds of the city to a railroad company, incorporated under the laws of this State, to aid in the construction of its railroad running into said city. Before the bonds had been actually issued, said company was consolidated with another railroad company, incorporated under the laws of an

adjoining state, the consolidated company taking a new name; and afterwards, without further petition or further order of donation, the bonds of said city so ordered were issued and delivered to the consolidated company, being made payable to bearer, and reciting that they were issued by authority of said act of March 14th, 1867, and in pursuance of the proper petition and order of the common council of said city, of a given date, making a subscription in bonds of said city to aid in the construction of the railroad named in said petition and order, "now consolidated with and forming a part of" said consolidated company, giving its name; and afterwards said bonds were sold to a purchaser without notice, and the city for some years regularly paid the interest thereon. Suit by a tax-payer of said city for an injunction, to restrain the collection of a certain amount of tax assessed against him for the payment of the interest on said bonds and to create a sinking fund for the payment of the principal, no irregularity in the petition of the freeholders or in said order of the common council making the donation being shown, and no irregularity in the consolidation of said railroad companies being claimed.

*Held*, that an injunction would not lie.

*Id.*

## CONSTITUTIONAL LAW.

See LIQUOR LAW, 5.

*Judicial Office.—Justice of the Peace.—City Clerk.*—The office of city clerk is not an office "under the State," within the meaning of section 16, article 7, of the constitution of Indiana; and one who has been elected to the office of justice of the peace, and has qualified and entered upon the duties of said office, is not ineligible to the office of city clerk during the term for which he was elected justice of the peace.

*Mohan v. Jackson*, 599

## CONTRACT.

See HUSBAND AND WIFE, 1 to 5. PLEADING, 16.

1. *Reformation of Contract.*—Where the terms of a contract are uncertain and loosely stated, a judgment reforming it will not be rendered.

*Winslow et al. v. Winslow et al.*, 8

2. *County Commissioners.—Pleading.—Judgment.—Presumption.—Husband and Wife.—Parties.*—A., being the owner of certain land, on which there was a mortgage, executed a warranty deed of conveyance thereof to B. Afterwards, the mortgage was foreclosed, and, upon the sale under the decree, the land was bid off by the county commissioners for the amount of the judgment, the land being worth a much larger sum. It being claimed by A. and denied by B. that said deed of A. to B. was intended as a mortgage, or a deed of trust, it was agreed by and between A., B. and the county commissioners, at a regular meeting of the board of commissioners, after the expiration of the year for the redemption of the land from the sheriff's sale, the agreement being entered of record, that said county commissioners would pay to either A. or B., whichever should establish title to said land by an action in a court of law or equity, a certain sum, deducting therefrom the amount of the bid of the commissioners at said sale under the decree of foreclosure; that A. and B. should make deeds of conveyance of said land to the county; and that A. (who was a married woman) and her husband should deliver possession to said commissioners; and thereupon said deeds were executed, and possession was given to the commissioners, who received the sheriff's deed for the land. Afterwards, an action for possession was brought by B. against A. and her husband, which resulted in a judgment of the circuit court in favor of the defendants, who notified said commissioners of said result, and

that A. was the proper person to whom to pay said balance. Suit by A. and her husband against said commissioners to recover said balance.

*Held*, that said judgment of the circuit court, which must be presumed to be in force, in the absence of any showing that it had been set aside or reversed, settled the title to the land, and entitled A. to the payment to her of said balance by the commissioners, according to the terms of said agreement.

*Held*, also, that it was not necessary to show in said complaint that the land was purchased by the commissioners for any of the purposes for which they were authorized to purchase land, a fact which must be presumed, in the absence of a contrary showing, and one which could not be inquired into except by the State.

*Held*, also, that the execution of the deed of conveyance by A. and her husband to the commissioners and the delivery of possession thereunder constituted a sufficient consideration for the agreement to pay said balance to A., which agreement was not affected by the fact that the year for redemption had expired.

*Held*, also, that it was not necessary to show in said complaint that there was an order of the board of commissioners authorizing said purchase at sheriff's sale by the commissioners.

*Held*, also, that said action against the commissioners was properly brought in the name of the husband and wife.

*The Board of Comm'rs of Henry Co. v. Slatter et ux.*, 171

3. *Public Policy.—House of Refuge.*—A written promise to pay to the State of Indiana a certain sum of money upon the condition that the empowered authorities of the State should locate at Plainfield, in said State, the reform school for juvenile offenders, the authority to locate said school being vested in the Governor and certain commissioners, who had no personal interest in the matter, and who complied with said condition, was not against public policy; and though by the act of March 8th, 1867 (Acts 1867, p. 137), "to establish a house of refuge," etc., no authority to receive such donations of money was expressly given or denied, yet the act of 1855, 2 G. & H. 660, expressly authorizing such donations for such purpose, was not in this respect repealed by said act of 1867.

*The State v. Johnson, Adm'r*, 197

4. *Public Policy.—Removal of Court-House.*—A written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had removed the county court-house from the public square and were building a new court-house elsewhere, would remove it back to said square, which offer was accepted by said commissioners, who entered on their records an order for such relocation, was not void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations.

*Stilson v. The Board of Comm'rs of Lawrence Co.*, 213

5. *Assent of Both Parties.*—To make a contract, the parties must agree upon and assent to the same stipulations. *Dolman v. Studebaker*, 286
6. *Agreement to Insert Provision in Will.*—Where services have been rendered by one under a verbal agreement by which, in consideration of such services, another had promised to insert a provision in his will, whereby he would devise and bequeath certain property to the person by whom such services were to be rendered, an action will lie against the administrator of the estate of the person so agreeing to make such provision in his will for the breach of such agreement.

*Lee, Adm'r, v. Carter*, 342

## CONVEYANCE.

*To Heirs.*—A deed made to the heirs of a living person named therein, without giving the names of the heirs, is void.

*Winslow et al. v. Winslow et al.*, 8

CONVERSION.

See SALE.

CORPORATION.

See CITY; DRAINING ASSOCIATION; RAILROAD; SCHOOL CORPORATION; TOWNSHIP; TURNPIKE.

1. *Injunction*.—An injunction will not lie to prevent the board of directors of a corporation from merely allowing as correct a fraudulent account against the corporation.

*Rogers et al. v. The Lafayette Agricultural Works et al.*, 296

2. *Action of Stockholders for Relief from Wrongful Acts of President*.—An action will lie in favor of a stockholder of a corporation for relief against the wrongful acts of the president thereof, when it is shown that a large per cent. of profits on the capital stock has been made by the corporation, and that the president will not allow the books of the corporation to be made to show the same; that the president is largely indebted to the corporation for the use of its property for his individual purposes and profit; that he has received all the emoluments of the corporation, and has not accounted therefor; that the majority of the directors are under his influence and control, and are instruments to do his bidding, and have abdicated their proper functions and surrendered the entire control of the affairs of the corporation to him; and such plaintiff need not allege that, prior to the commencement of his action, he has made a demand upon the board of directors to commence suit against the president. And where all the stockholders are made parties to the action, this is equivalent to such plaintiff's suing for himself and all other stockholders similarly situated. *Id.*

3. *Assignment of Property for Benefit of Creditors*.—A corporation, unless restrained by its charter or by general law, and therefore a manufacturing corporation of this State, by a majority of its board of directors, without the express authority or consent of its stockholders, may cease to do business and assign its property to a trustee, to be sold, the proceeds to be applied to the payment of the debts of the corporation, and the surplus, if any, to be divided *pro rata* among the stockholders. Such action of a corporation will not constitute a surrender of its franchises as a corporation, or work its dissolution.

*DeCamp et al. v. Alward*, 468

4. *Same*.—The good faith of the directors in the passage of the resolution to make such an assignment and the necessity or expediency of the assignment are questions for the jury. *Id.*

COSTS.

*New Trial*.—The defendant in an action having moved for a new trial for cause, the plaintiff consented that a new trial should be granted upon such terms as the court in its discretion might think just.

*Held*, that, in granting such new trial at the costs of the defendant, it was error to require the payment of the costs within a certain time.

*Sunman v. Brewin*, 140

COUNTY COMMISSIONERS.

See ATTORNEY, 1, 2; CONTRACT, 2.

CRIMINAL LAW.

See BAIL; HIGHWAY, 6, 7, 8; LIQUOR LAW; NAME, 1 to 4; VENUE.

1. *Assault and Battery—Evidence*.—If an indictment for an assault and battery allege that the battery was committed with a certain instru-

- ment, proof that it was done with a different instrument will be sufficient. *Ryan v. The State*, 167
2. *Perjury.—Witness Before Grand Jury.*—An indictment for perjury may be predicated upon a false swearing before a grand jury. *The State v. McCormick*, 169
  3. *Same.*—Such an indictment is bad, if it contain no allegation of any matter as having become material in the investigation before the grand jury. *Ib.*
  4. *Indictment Charging Distinct Offences.—Election Between Charges.*—Where a count of an indictment charges more than one substantive offence, or where different counts charge different substantive offences, the election of the State to place the defendant on trial for one of the offences so charged amounts to an abandonment of the other charges, which thereupon cease to be parts of the indictment, as if, as to the counts or parts of counts containing them, the court had sustained a motion to quash, or the prosecutor had entered a *nolle prosequi*. *Mills v. The State*, 187
  5. *Same.—Rape.—Assault and Battery.—New Trial.*—Indictment charging that, at, etc., on, etc., A. B. “did, in a rude, insolent and angry manner, unlawfully touch, strike and wound” C. D., “a woman, and did, then and there, her, the said” C. D., “a woman, unlawfully, forcibly and against her will, feloniously ravish and carnally know.” Under an order of court requiring the prosecuting attorney to elect whether he would put the defendant on trial for a rape or for an assault and battery, he elected to try him for a rape. There was a verdict of guilty of an assault and battery; and, on the defendant’s motion, a new trial was granted. *Held*, that the indictment charged only one substantive offence, that of a rape. *Held*, also, that the election to place the defendant on trial for a rape, with the order requiring such election, was a nullity, and did not take out of the case the charge of an assault and battery necessarily included in the charge of a rape, which minor offence need not be separately charged in an indictment for the greater. *Held*, also, that the defendant took said new trial as to the whole case, and it was error to sustain his objection to being tried thereon for a rape, and to put him on trial for an assault and battery. *Ib.*
  6. *Horse-Racing.—Evidence.*—An indictment charged the defendant with suffering his horse to be run in a horse-race; the evidence showed that the defendant rode in a race a horse which was owned by another person. *Held*, that the evidence was insufficient. *Robb v. The State*, 216
  7. *Grand Jury.—Where County Commissioners Have Failed to Select.*—At the March session, 1874, of a board of county commissioners, two grand juries were selected according to law, one for the March term and one for the June term, 1874, of the circuit court, and no grand jury for the October term, 1874, or for the January term, 1875, was ever selected by the commissioners. At the October term, 1874, said court ordered that the grand jury be summoned to appear on the second day of the next term of said court, and the grand jury so selected for the June term, 1874, assembled under said order at the January term, 1875. *Held*, that said order for the summoning of a grand jury at the January term, 1875, was sufficient, and that said grand jury was competent to find an indictment at said January term. *Willey v. The State*, 246
  8. *Indictment.—Abortion.*—In an indictment for an attempt to procure an abortion, an averment that the procurement of the miscarriage was not necessary to preserve the life of the woman is equivalent to an averment that the miscarriage was not necessary to preserve her life. *Ib.*
  9. *Contradictory Statements in Bill of Exceptions.*—Where, in a bill of excep-

tions in a criminal action, it was stated that the defendant pleaded not guilty, and also that he consented that the court should find him guilty and sentence him to imprisonment for a certain period, and there was a verdict of guilty, and a motion for a new trial, because of the insufficiency of the evidence, was overruled, the Supreme Court took the view most favorable to the defendant, and treated the case as one in which there had been a plea of not guilty, and, the evidence in the record being insufficient, reversed the judgment. *Ib.*

10. *Assault and Battery.—Name.*—In a prosecution for an assault and battery, the name of the injured person is a part of the description of the offence, and must be strictly proved as charged.

*McLaughlin v. The State, 279*

11. *Robbery.—Description of Money.*—An indictment for robbery, the property alleged to have been taken being bank notes, or bills, or United States treasury notes, or bills, which, in describing such notes, or bills, does not state their denominations by the use of the word denomination or equivalent words, is bad on motion to quash.

*Arnold v. The State, 281*

12. *Statutory Description of Offence.*—An indictment under a statute, and therefore every indictment in this State, must embrace a charge of all the particulars that enter into the statutory description of the offence, either in the language of the statute or other equivalent language.

*The State v. Wright et al., 307*

13. *Same.—Assault and Battery.*—An indictment for an assault and battery which fails to allege that the unlawful touching, etc., was done either in a rude or insolent or angry manner, is bad. *Ib.*

14. *Instruction to Jury.—Reasonable Doubt.*—Where, on the trial of a criminal action, the court instructed the jury that “a reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury to a moral or reasonable certainty of the defendant’s guilt;”

*Held*, that this was correct, and that if the defendant desired a more particular definition, he should have submitted to the court such an instruction.

*Sullivan et al. v. The State, 309*

15. *Indictment.—Suffering Minor to Play a Game.*—An indictment against the owner of a billiard table for permitting a minor “to play a certain game said table, called pool,” was bad because of the omission of the word “at” or “upon” before the words “said table.”

*Donniger v. The State, 326*

16. *Same.—Name of Person Playing with Minor.*—An indictment for permitting a minor to play a game upon a billiard table is defective, if it does not state the name of the person with whom the minor was permitted to play the game. *Ib.*

17. *Christian Name.—Initial Letters.*—The law knows and recognizes as applicable to a person but one Christian name, and if, in a criminal prosecution for an assault and battery, in stating the name of the person injured, in charging the offence, one Christian name be properly stated, and the initial letter of another Christian name be inserted, such initial letter will be regarded as surplusage, and it will be sufficient to prove the Christian name as stated, with the surname, and without such initial letter.

*Choen v. The State, 347*

18. *Reformatory Institution for Women and Girls.—Instruction to Jury.*—The penal department of the Indiana Reformatory Institution for Women and Girls was not intended as a substitute for the state prison and the county jails, for female convicts over fifteen years of age, but only as a substitute for the state prison for such convicts. It was, therefore, error to charge the jury, on the trial of a woman for murder, after the opening of said penal department for the reception of female convicts,

that in case of the conviction of the defendant of manslaughter, the penalty was at least two years' imprisonment in the penal department of said reformatory institution, omitting to charge that the jury might, in their discretion, imprison the defendant in the county jail at hard labor, under the direction of the jailor. *Ruble v. The State*; 358

19. *Receiving Stolen Goods.—Instructions.*—On the trial of an indictment containing a count for larceny and a count for receiving stolen goods, the court, having charged the jury, as to the former count, that one of the essentials thereof was, that the goods "were so stolen by the identical" defendant, naming him, "named in the indictment, alone, or by him acting jointly with others," instructed as to the latter count that it was material thereunder "that the articles named in that count, or some of them, were by some one feloniously stolen, taken and carried away from" the owner named in the indictment.

*Held*, that the jury could not have been misled by said instruction as to the receiving of stolen goods, by its failure to state that the goods must have been feloniously taken by some one other than the defendant.

*Owen v. The State*, 379

20. *Same.*—The court also instructed the jury as to said count for receiving stolen goods, that it was essential thereunder "that the identical" defendant, naming him, "named in that count, did feloniously, knowing that such goods were so stolen, receive or conceal them, or a part of them."

*Held*, that this instruction was not erroneous for not stating that the goods must have been received from the thief or his agent. *Ib.*

21. *Practice.—Statement of Case to Jury.*—In a criminal action, after the prosecuting attorney had, at the proper time, stated the case to the jury, the defendant's attorney asked leave to be allowed to reserve the statement of the defendant's defence until the State had offered the evidence for the prosecution; but the court ruled that he must then state the defendant's defence, or not at all, and refused to allow him to reserve such statement until after the evidence for the prosecution had been offered and to then make the statement; but there was no offer made, after the prosecution had closed, to make a statement of the defence.

*Held*, that this ruling was erroneous. (BIDDLE, J., dissented, holding that the defendant waived his right to make such statement by not making his offer at the proper time, which was after the introduction of the evidence for the prosecution.) *Willey v. The State*, 421

22. *Abduction for Prostitution.—Evidence.*—To sustain a prosecution for the abduction of a female for the purpose of prostitution, under section 16, 2 G. & H. 441, the female must have possessed actual personal virtue, and therefore acts of illicit sexual intercourse committed by her previous to the alleged abduction may be shown in evidence on behalf of the defendant.

*Lyons v. The State*, 426

23. *Permitting Minor to Play a Game.—Evidence.*—On the trial of an indictment under the act of March 8th, 1873 (Acts 1873, p. 30), for unlawfully permitting a minor to play a game of billiards with another person, upon a table of which the defendant had the control, it is not necessary to a conviction that it should be proved that anything was wagered on the game which was played. *Bond v. The State*, 457

24. *Oath of Grand Jury.*—The form of the oath to be administered to the grand jury, found on page 387, 2 G. & H., has been superseded by that provided in the act of December 31st, 1865, 3 Ind. Stat. 279. *Ib.*

25. *Arrest of Judgment.*—It is not a cause for arrest of judgment in a criminal action, that the grand jury was not sworn according to the statutory form. *Ib.*

26. *Venue.—Evidence.*—On the trial of an indictment for murder, in the

Fountain Circuit Court, a witness for the State, who testified to the whole transaction, having been present and having seen it all, concluded his evidence by saying, "This took place" (giving the date) "in Fountain county, Indiana."

*Held*, that the venue was proved.

*Laydon v. The State*, 459

27. *Arrest of Judgment*.—Where the facts stated in an indictment constitute a public offence of which the court has jurisdiction, a motion in arrest of judgment will not lie. *Ib.*

28. *Larceny.—Possession of Stolen Goods*.—The possession, by one not the owner, of personal property alleged to have been stolen, does not raise a presumption that such possessor is guilty of larceny, unless a previous larceny of the property has been established by proper evidence. If the larceny has been so established, and the exclusive possession of the property by one not the owner soon after the larceny has been proved, such possession, if not explained by direct evidence, or by attending circumstances, or by the character and habits of life of the possessor, or otherwise, is conclusive of his guilt as the thief.

*Bailey v. The State*, 462

29. *Same.—Appropriating Lost Property*.—If personal property be lost by the owner and found by another person, and by the latter be taken and appropriated to his own use, the finder knowing the owner, he is guilty of larceny; but if he do not know, and have not the means of ascertaining, who is the owner, he is not guilty of larceny, even though he may not have advertised the property, and however reprehensible his conduct may be afterwards, in attempting to appropriate it to his own use. *Ib.*

30. *Evidence.—Acts of Accomplice not on Trial*.—Where, on the trial of a criminal action, it is shown that other persons, with the defendant, were parties to the crime, though they are not on trial, their acts, doings, and sayings may be given in evidence against their accomplice who is on trial. *Wiley v. The State*, 475

31. *Malicious Trespass*.—The distinction between the civil action for trespass and the criminal prosecution for malicious trespass should be strictly maintained, and the criminal action should not be sustained as a means of redressing a private grievance, or for the purpose of determining the title to real estate. *Dawson v. The State*, 478

32. *Same.—Malice.—Evidence*.—Malice is an essential ingredient of the crime of malicious trespass; and where, on the trial of a prosecution for malicious trespass in removing a fence erected by the prosecuting witness, it was proved that the defendant, in removing the fence, acted under a claim of ownership of the land on which it was erected, through a long line of written title, with a colorable right, and under professional legal advice, and with apparent good faith, there could be no conviction. *Ib.*

33. *Indictment.—Intoxication in Public Place*.—An indictment under section 11 of the liquor law of 1875, for being found in a public place in a state of intoxication, described the place as "a public street, highway, and sidewalk, situated in" a county named "and State of Indiana."

*Held*, that the indictment sufficiently described a public place.

*The State v. Waggoner*, 481

34. *Same*.—A public place, as intended by such a statute, is a place where all persons are entitled to be; and an indictment under the statute should describe the place with reasonable certainty, so that the court may see that it is a public place, within the meaning of the statute. *Ib.*

35. *Bill of Exceptions*.—A bill of exceptions is not necessary to present for the consideration of the Supreme Court the ruling of a court in quashing an indictment. *The State v. Day*, 483

36. *Same.—Transcript on Appeal by State*.—Section 155 of the criminal code

applies only to a case where a bill of exceptions is necessary to raise the questions presented. *Ib.*

37. *Words.*—"Ditch."—"Embankment."—*Obstruction of Highway.*—Words in an indictment, except such as are technical or defined by law, must be construed in their common and usual acceptation. An indictment for obstructing a highway by unlawfully cutting a "ditch alongside of, and making an embankment alongside of and across said highway, thereby causing water to flow in said road," was not bad for its failure to allege the depth of the ditch and the height of the embankment. *Ib.*
38. *Concealed Weapon.*—*Evidence.*—*Negative Averment.*—Under an indictment charging the defendant with carrying a concealed weapon, he not being a traveller, it is not incumbent on the State to prove such negative, the affirmative being matter of defence. *Wiley v. The State*, 516
39. *Indictment.*—*Abduction of Female for Purpose of Prostitution.*—An indictment charging the defendant with the abduction of a female "for the purpose of having illicit sexual intercourse with her" does not charge an abduction of a female "for the purpose of prostitution," within the meaning of the statute, 2 G. & H. 441, sec. 16. *Osborn v. The State*, 526
40. *Forgery.*—*Indictment.*—An indictment for forging or for knowingly uttering a counterfeited instrument of writing must set forth an exact copy of the instrument. *The State v. Cook*, 574
41. *Same.*—An indictment for forgery must show that the instrument of which the forgery is predicated is such on its face as is naturally calculated to have some effect, or, if that be not so, extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency. *Ib.*
42. *Same.*—An indictment for forgery set out a copy of the instrument alleged to have been forged, as follows: "Trublood & Allen, Salem, Ind.: Please let Jim Cook" (the defendant) "have two dollars' worth on my credit. Fred. L. Prow, Salem." *Held*, that this instrument, with the allegation that the drawees were in the grocery trade, did not support an averment in the indictment that it was "for the payment of money and delivery of grocery goods." *Ib.*
43. *Same.*—An allegation in an indictment that the defendant forged a certain instrument is inconsistent with a subsequent allegation that he then and there knew said instrument was then and there false, forged, etc. *Ib.*

#### DAMAGES.

See RAILROAD, 4; TELEGRAPH, 1.

1. *Measure of for Refusal to Take Property Purchased.*—It seems that where a person agrees to make a purchase of property, and then refuses to proceed in the purchase and take the property, the loss of the bargain constitutes the proper measure of damages, and not the price of the property, the title of which has not passed. *Dolman v. Studebaker*, 286
2. *Measure of.*—*Contract of Railroad Company to Erect Fences.*—Where a railroad company, in part consideration for the right of way over land, promised the land-owner to erect fences on each side of its railroad through said land, and to make cattle guards and farm crossings, the company was liable, upon its failure to perform such promise, to the cost of constructing such fences, etc., and it was not necessary, in order to recover such damages, that the fences, etc., should have been constructed by the plaintiff before bringing suit. *The L., C. & S. W. R. W. Co. v. Wray*, 578

#### DECEDENTS' ESTATES.

*Pleading.*—*Claims.*—To file a claim against a decedent's estate, it is not

required that there be a regular complaint constructed according to the ordinary rules of pleading, but merely a succinct statement of the claim, which will be sufficient when it apprises the administrator of the nature of the claim, and the amount demanded, and shows enough to bar another action for the same demand. Therefore, where the complaint alleged that the claimant had paid to the decedent a certain sum of money, which he had agreed to repay to the claimant in default of conveying to him an interest in certain leases, and that the decedent had conveyed to other persons, it was, on demurrer, held sufficient as an allegation that the decedent had rescinded the contract, and showed a right in the claimant to recover what he had paid.

*Post, Adm'r, v. Pedrick, 490*

### DEMAND.

*Certificate of Deposit.*—A certificate of deposit was issued by a bank for a certain sum, subject to the order of the depositor, at a certain date, payable on return of the certificate.

*Held*, in an action on said certificate against the bank, brought by an assignee, that there could be no recovery without proof of an actual demand and refusal of payment. *Brown et al. v. McElroy, 404*

### DEMURRER.

See PLEADING, 12; SUPREME COURT, 3.

1. *Capacity to Sue.*—The question of the want of capacity of the plaintiff to sue cannot be raised under a demurrer to the complaint for its failure to state sufficient facts to constitute a cause of action.

*Rogers et al. v. The Lafayette Agricultural Works et al., 296*

2. *Sufficiency of Facts.*—If the plaintiff be entitled, under the facts stated in his complaint, to any relief, whether injunctive or in some other form, against any defendant, a demurrer to the complaint, for want of sufficient facts, filed by such defendant, should be overruled. *Ib.*

3. *Joint Demurrer.*—Where there is a joint demurrer filed to several paragraphs of an answer, if one paragraph be good, the demurrer should be overruled as to all. *Nichol, Adm'r, v. McCalister, 586*

### DEPOSITION.

1. *Suppression of Question for Irrelevancy.*—A question in a deposition, which may in the course of the trial become relevant, should not, before the trial, be suppressed for alleged relevancy.

*Covey, Adm'r, v. Campbell, 157*

2. *Secondary Evidence.*—A motion to suppress, in a deposition, parol evidence of the contents of a record, for the introduction of which a proper foundation has not been laid, should be held under advisement until the trial; and if secondary evidence be not rendered admissible, such parol evidence should be excluded. *Nichol, Adm'r, v. McCalister, 586*

3. *Commission.*—Where a deposition purports to have been taken before, and to be certified by, an officer in another state, and the record does not set forth a commission, or show that one was issued, such deposition cannot be used in evidence in this State.

*Baber v. Rickart et al., 594*

4. *Authentication.*—Where a deposition, purporting to have been taken before a justice of the peace of another state, is authenticated only by the certificate of said justice, and there is in the record no commission containing the name of the officer before whom the deposition was to be taken, the deposition will be suppressed on motion, or excluded, for want of authentication. *Ib.*

5. *Same.*—If there be in the record a commission naming the officer before whom the deposition is to be taken, such certificate of the officer will be sufficient, but if there be a commission which does not name the officer, and the officer by whom the deposition is certified have no seal, his certificate must be authenticated by the certificate and seal of the clerk or prothonotary of a court of record of the county in which said officer exercises the duties of his office. *Ib.*
6. *Justice of the Peace of Another State.*—A justice of the peace of another state cannot be allowed, in a court of this State, to correct his certificate to a deposition purporting to have been taken in said other state. *Ib.*

## DESCENT.

*Adopted Child.—Widow.*—An unmarried man, who had been married and whose wife had died, leaving surviving her said husband and one child, the issue of said marriage, which afterwards died, leaving surviving its said father, subsequently adopted a son in due form of law, and afterwards married again, and died intestate, seized in fee of certain real estate, leaving surviving said second wife and said adopted son.

*Held*, that said real estate descended, under section 23 of the statute of descents, one-half to said adopted son and the other half to the widow; and her share was not affected by the proviso of section 24 of said statute, and at her death would not descend to said adopted son, he not being the child of her said husband "by a previous wife."

*Isenhour v. Isenhour et al.*, 328

## DIVORCE.

See PARENT AND CHILD, 1, 2.

## DOMICIL.

1. *Taxation.*—In the provision of the assessment law, that "all personal property owned by persons residing within this State, whether it is in or out of this State, and all personal property within this State, owned by persons not residing within this State, subject to the exception, hereinafter stated, shall be subject to taxation," 1 G. & H. 69, sec. 3, the word "residing" has reference to fixed and permanent domicil, and not to temporary or transitory residence.

*Culbertson v. The Board of Comm'rs of Floyd Co.*, 361

2. *Change of Domicil.*—A person can have but one domicil at a time, and cannot lose one until he has acquired another. *Ib.*
3. *Temporary or Indefinite Absence from Domicil.*—A person whose domicil, for many years prior to August, 1870, had been in this State, where he owned a dwelling-house, then rented the same, with the furniture thereof, for an indefinite time, three months' notice being required to terminate the lease, and, in company with his family, left this State and went to Europe, with the intention of ceasing to be a resident of Indiana for an indefinite time, and with the expectation of again becoming a citizen of Indiana at some indefinite time in the future, probably two or three years. In November, 1872, he and his family returned from Europe, where they had lived in the meantime, to Indiana, and resumed possession of said dwelling-house, where they continued to reside.

*Held*, that said person was taxable for the years 1871 and 1872, as a person "residing within this State." *Ib.*

## DRAINING ASSOCIATION.

1. *Assessment.—Pleading.*—In an action by a draining association to enforce payment of an assessment on the land of one not a member of the asso-

ciation, to aid in the construction of a ditch, under the law of 1869, it is not necessary that the complaint should describe the beginning, course and termination of the ditch, or show that the company divided the work into sections before its actual construction was begun, or that with such complaint should be filed the notice of the assessment, or the notice required to be posted in the recorder's office by the secretary of the company, or the order of the board of directors fixing the per cent. of the assessment which each person assessed shall pay.

*Bannister v. The Grassy Fork Ditching Ass'n*, 178

2. *Same.—Schedule.*—The appraisers of benefits and injuries to lands occasioned by the construction of such ditch should, in their schedule and appraisal, show that they have included therein all lands, the intrinsic or market value of which will, in their judgment, be liable to be affected by the construction of the proposed work; and where, in their schedule and appraisal, the appraisers included merely certain lands which they alleged would be benefited, without showing that they were all the lands that would be benefited, and without showing whether any lands would be injured or not, such appraisal was invalid. *Ib.*
3. *Same.—Description of Land.—Judicial Notice.*—Where, in the description of land in an assessment made thereon to aid in the construction of a ditch by a draining association, it does not appear in what county the land is situated, the court may know judicially, from the congressional survey, that it is in a certain county. *Ib.*
4. *Same.—Notice of Assessment.*—Actual notice to a land-owner, not a member of such association, of the time and place of making such an assessment is not necessary. The notice may be given in a newspaper. *Ib.*
5. *Same.—Answer.—Change of Appraisalment.*—In an action to recover the amount of such an assessment, an answer alleging that, after the appraisalment of benefits was made and returned by the appraisers, it was changed by altering assessments from less sums to larger ones, and from larger to less, without any meeting of the appraisers to equalize the same, or any advertisement for such meeting, but not showing that the defendant was injured by what was done, was bad on demurrer. *Ib.*
6. *Same.—Evidence.—Appointment of Assessors.*—Where an appointment of assessors was made by a judge in vacation, written on the petition or on a separate paper and signed by the judge, and was not filed in court;  
*Held*, that it was not admissible in evidence, over objection, without proof of its genuineness. *Ib.*

## EASEMENT.

See EVIDENCE, 7.

1. *License.—Drain.*—A license by the owner of land to the owner of adjoining land to construct and use perpetually a ditch over the land of the former for the purpose of draining the land of the latter, may be verbal, and, upon such construction and continued use, is irrevocable by the grantee of the former, though unforeseen injuries result to the former and his grantee from the construction and use of such drain.  
*Hodgson v. Jeffries*, 334
2. *Vendor and Purchaser.—Notice.—Drain.*—A jury may infer that the purchaser of land over which an open drain, with water flowing therein from the land of another adjoining, passes near the barn and barn-yard on the land purchased, had knowledge of the rights of the owner of said adjoining land to maintain said drain and flow the water from his own lands through it. *Ib.*

## ESTOPPEL.

See EXECUTOR AND ADMINISTRATOR; HUSBAND AND WIFE, 5.

## EVIDENCE.

See CRIMINAL LAW, 30; DEPOSITION; HUSBAND AND WIFE, 4; NAME, 2, 3; SLANDER AND LIBEL, 3, 9, 10; TURNPIKE, 13; VARIANCE; WITNESS.

1. *Conversation*.—When a conversation is given in evidence, the opposing party is entitled to have all that was then said in relation to the same matter given in evidence; but where a conversation about a given matter is introduced in evidence, the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation. *Miller v. The Wild Cat Gravel Road Co.*, 51
2. *Privileged Communication*.—*Attorney*.—*Husband and Wife*.—On the trial of an action brought by a married woman to recover possession of her separate real estate from her vendee, a witness may not, over her objection, detail a conversation had with her by him as the attorney of her husband in relation to the sale of certain personal property purchased with money derived from the sale of such real estate. In such case the attorney will be regarded as the attorney of both the husband and wife. *Scranton v. Stewart et al.*, 68
3. *Judgment Procured by Fraud*.—Where a court may ascertain by inspection of its own records that a judgment, the record of which is offered in evidence, valid on its face, was procured by fraud, it is error to admit such evidence over objection. *Ib.*
4. *Inspection of Premises by Jury*.—*Turnpike*.—The impressions made upon the minds of jurors by the examination of premises to which the jury has been sent for such examination do not constitute a part of the evidence in the cause; and, therefore, it was error to instruct the jury, on the trial of a proceeding to condemn the right of way for a turnpike company, that, in determining the damages, the information derived from the view had by the jury of the premises through which it was proposed to construct the road should be considered as a part of the evidence. *Heady v. The Vevay, etc., Turnpike Co.*, 117
5. *Opinion of Witness as to Value of Service of Attorney*.—On the trial of an action to recover the value of services rendered by the plaintiff as an attorney in defending another action, a question is not irrelevant which seeks the opinion of a witness as to the value of such services, such opinion being founded upon the character of the case set out in the complaint filed in said other action, or upon a hypothetical case put to the witness corresponding with the real case. *Covey, Adm'r, v. Campbell*, 157
6. *Instruction Concerning Evidence*.—The failure of a court to instruct the jury as to the proper purpose for which evidence introduced has been admitted cannot render erroneous the admission of the evidence. *Lipprant v. Lipprant*, 273
7. *Drain*.—*License*.—In an action by one who has constructed and maintained a drain from his own land across the land of another by the alleged license of the latter, for an obstruction of the drain by the latter, the plaintiff may properly show in evidence, as showing the extent of the injury caused by the obstruction, that there was no other outlet than said drain for the water flowing in the lateral ditches cut by him on his own land; but the defendant cannot show that plaintiff had another outlet than said drain, over his own land, by which he could drain his marshy and wet land, when such evidence does not tend to show that the flow of water in said lateral ditches could be carried off without the aid of said drain; nor in such an action can the defendant, for the purpose of showing that such license had not been given, or, if

given, had been revoked, prove that he or his grantor had built, close to the drain, his house and barn, and made other improvements which could not properly be enjoyed if the drain should be continued.

*Hodgson v. Jeffries*, 334

8. *Proof of Sheriff's Sale*.—On the trial of an action for the breach of the covenants in a deed of conveyance of land executed by the defendant to the plaintiff, the latter founding his claim for damages on a previous sale of the land to a third person by the sheriff, the deed of the sheriff may be introduced in evidence as a link in the chain of title; but it is not sufficient of itself to prove the sale, without also the judgment and execution.

*Nichol, Adm'r, v. McCalister*, 586

9. *Admissibility.—Warranty*.—Where, upon the trial of an action, the question in issue was whether a certain ditching machine sold with warranty by the plaintiff to the defendant would perform in a certain manner, at a certain place, as specified in the warranty, evidence as to the manner in which it performed at a certain place in another state was competent, as tending to prove its capacity at the place specified in the warranty.

*Baber v. Rickart et al.*, 594

## EXECUTOR AND ADMINISTRATOR.

*Estoppel*.—Where an administrator is sued, as such, for the recovery of a money judgment against the estate represented by him, he cannot, in such action, set up an estoppel to protect his title to real estate under a purchase thereof made by him in his individual capacity from the heirs-at-law of his decedent.

*Lee, Adm'r, v. Carter*, 342

## FRAUD.

See EVIDENCE, 3; HUSBAND AND WIFE, 6 to 9; PLEADING, 11.

1. *Pleading.—Representation Contradicting Written Agreement*.—The purchaser of a certain undivided portion of a stock of goods, at the time of the sale, executed to the seller a bond to indemnify him against the payment of a like portion of his debts and liabilities.

*Held*, in an action on said bond, on demurrer to an answer which admitted its execution, that the defendant could not therein rely upon a representation as fraudulent alleged to have been made by the seller to the buyer, at the time of the transaction, to the effect that there were no such debts and liabilities.

*Davis et al. v. Fearis et al., Ex'rs*, 128

2. *Action to Set Aside Fraudulent Judgment.—Pleading*.—Where, in a proceeding to foreclose a mortgage on land, judgment had been fraudulently taken for a larger amount than was due, the plaintiff in a subsequent judgment, which was a lien on the same land, not a party to such foreclosure suit, might maintain an action to set aside such judgment of foreclosure as void, and it was not necessary that his complaint should set out a complete record of the foreclosure suit.

*Haxbaugh v. Hohn et al.*, 243

## GIFT INTER VIVOS.

See TRUST, 2.

## GRAND JURY.

See CRIMINAL LAW, 24.

## HEIRS.

See CONVEYANCE; MORTGAGE; WILL, 2.

## HIGHWAY.

1. *Proceeding to Lay Out and Establish.—Parties.*—The fact that one who filed a petition before a board of county commissioners to lay out and establish a highway, in whose name, with the names of others who were petitioners, the case was carried on before said board and in the circuit court on appeal, did not sign said petition, was not a good ground for dismissing the case in the circuit court.  
*Hays v. Parrish et al.*, 132
2. *Same.*—In a proceeding to lay out and establish a highway, the fact that only two of the three viewers appointed by the board of commissioners took the required oath, acted and made the report, did not render the view and report insufficient. *Ib.*
3. *Same.—Oath Taken by Viewers.—Failure to Subscribe Oath.*—In such case it is not required by statute, and therefore is not necessary, that the oath taken by the viewers shall be subscribed by them. *Ib.*
4. *Same.—Trial on Appeal.—Practice.*—In the circuit court, on appeal in a proceeding to lay out and establish a highway, it is not the practice to appoint viewers, but to try the cause *de novo* by the court or a jury. *Ib.*
5. *Same.—Assessment of Damages.*—Where, in such proceeding, the person who appeals to the circuit court has not filed a claim for damages, either before the board of commissioners or in the circuit court, he is not entitled to an assessment of his damages; and where he is entitled to an assessment of damages, they are properly assessed by the court or jury trying the cause on appeal, and it is not error for the court to refuse to appoint three disinterested freeholders, on his motion, to assess his damages. *Ib.*
6. *Criminal Law.—Obstruction of Highway.*—On the trial of a prosecution for obstructing a highway, it was not error to instruct the jury that before they could convict they must be satisfied, beyond a reasonable doubt, that there was a public highway where it was claimed that the obstruction had been placed, that there was an obstruction, and that the defendants, or some one or more of them, caused the obstruction.  
*Sullivan et al. v. The State*, 309
7. *Dedication.*—The fact that a road has been used by the public for a considerable length of time, with the knowledge of the owners of the land, does not create a presumption of dedication, unless such use be also with the consent of said owners. *Ib.*
8. *Obstruction.*—It was not error to instruct the jury, on the trial of a prosecution for obstructing a highway, that it was proper for them, in determining the question whether a highway existed by prescription, to inquire whether it was shown by the evidence that one of the defendants assisted in cutting out such road, and whether one of the defendants, while owning land over which it passed, admitted the existence of the highway. *Ib.*

## HOUSE OF REFUGE.

See CONTRACT, 3.

## HUSBAND AND WIFE.

See CONTRACT, 2; EVIDENCE, 2; PRACTICE, 4; TRUST AND TRUSTEE, 3; WITNESS, 3.

1. *Married Woman.—Infancy and Coverture.—Contract.—Disaffirmance.*—A deed of conveyance of the separate real estate of a married woman, or of an infant married woman, executed by her alone, is void; if her husband join therein, the disability of her coverture is wholly removed, and, if she be an infant, that of her infancy renders the joint convey-

ance not void, but voidable, and vests the title to the land in the grantee, subject to the female grantor's right of disaffirmance upon her arrival at the age of twenty-one years, and until divested by some act done by her to disaffirm the contract; which, though she remain a *feme covert*, must be done by her within a reasonable time after her arrival at age, although she is not required to bring her action to recover possession during the continuance of her coverture.

*Scranton v. Stewart et al.*, 68

2. *Same.—Act of Disaffirmance.*—A written notice given by such *feme covert* after her arrival at age, that she disaffirms such executed contract, is a sufficient act of disaffirmance. *Ib.*
3. *Same.—Reasonable Time.*—Such an act of disaffirmance done within three years and a half after the female grantor's arrival at age was held to have been done within a reasonable time. *Ib.*
4. *Same.—Evidence.—Ratification.*—On the trial of an action brought by a married woman to recover possession of her separate real estate, conveyed by her and her husband to the defendant, on the ground that when the conveyance was made she was an infant and a *feme covert*, and that she had given to the defendant written notice of her disaffirmance of the conveyance within three years and a half after her arrival at age, acts and declarations of the plaintiff done and made after her arrival at age and before her disaffirmance of the contract, tending to prove a ratification of her conveyance to the defendant, were admissible in evidence. *Ib.*
5. *Same.—Estoppel.*—In such case, the fact that when the female grantor became of age the defendant was indebted to the husband of the female grantor upon notes given for the purchase-money of said real estate, in a large sum, which was afterwards paid by the defendant, would not estop her from subsequently disaffirming the contract, unless she knew that such purchase-money was unpaid and the defendant was ignorant of the fact that the plaintiff was an infant when she executed the conveyance. *Ib.*
6. *Witness.*—On the trial of an action brought by a husband and wife to recover the possession of real estate to which the plaintiffs claimed title under a conveyance made to them jointly, both the husband and the wife were competent witnesses for the plaintiffs to disprove the charge that said conveyance was made to the plaintiffs jointly to defraud creditors of the husband. *McConnell v. Martin et ux.*, 434
7. *Conveyance.—Fraud.*—Where real estate has been conveyed to a husband and wife, such real estate cannot, in the absence of fraud, be sold on execution under a judgment rendered against said husband after said conveyance, for a debt contracted by him before the conveyance. *Ib.*
8. *Same.—Evidence.*—In determining the question whether said conveyance was made to the husband and wife jointly for the purpose of defrauding creditors of the husband, the amount and value of his property at the time of the conveyance are proper matters of inquiry, and the fact that at that time he had other property sufficient to pay his debts is admissible in evidence. *Ib.*
9. *Same.—Wife's Separate Property.*—Where a husband and wife united in conveying real estate which was the separate property of the latter, in exchange for other real estate, under an agreement that the title to that received should be taken in her name, and, without her knowledge or consent, said title was taken in the name of the husband, and the real estate so received was exchanged by said husband and wife, with money belonging to the husband, for other real estate, the title of which was taken in the names of the husband and wife jointly, the real estate so last transferred by them could not be regarded as the

property of the husband in considering the question whether or not the title of the real estate for which it was exchanged was taken in the names of the husband and wife for the purpose of defrauding creditors of the husband. *Id.*

### INTERROGATORIES TO JURY.

See PRACTICE, 15, 18.

### INTERPLEADER.

See PRACTICE, 10.

### INJUNCTION.

See CITY, 10; CORPORATION, 1.

### INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 14, 19; EVIDENCE, 6; PRACTICE, 7, 12, 13, 16, 20; SUPREME COURT, 15.

### INFANCY.

See HUSBAND AND WIFE, 1 to 5.

*Ratification of Contract of Infant.—Presumption of Knowledge of the Law.*—An instruction to the jury that a person of mature age, in order to ratify a contract made by him during infancy, must know that he is not bound by such contract, is not inconsistent with another instruction that every person of sound mind and mature age is presumed to know the law.

*Ogborn et ux. v. Hoffman*, 439

### JUDGMENT.

See CONTRACT, 2; EVIDENCE, 3; PRACTICE, 4.

### JURISDICTION.

See AMENDMENT, 2; PRACTICE, 10; RAILROAD, 7, 8.

### JUROR.

See TURNPIKE, 11, 12.

*Challenge.—Opinion Formed and Expressed.*—It is not a good cause for the challenging of a juror, that he testifies that he has formed and expressed an opinion upon the merits of the cause and the rights of the parties, as the result of a conversation with one of the parties or from rumor, but that the opinion formed will readily yield to the evidence presented on the trial, and that he can hear the evidence and decide the case as impartially as though he had not formed and expressed an opinion.

*Scranton v. Stewart et al.*, 68

### JURY.

*Inspection of Premises by.* See EVIDENCE, 4.

### JUSTICE OF THE PEACE.

See AMENDMENT, 2; BASTARDY, 1; CONSTITUTIONAL LAW; DEPOSITION, 3 to 6.

### LICENSE.

See EASEMENT, 1; EVIDENCE, 7.

LIQUOR LAW.

1. *Indictment.*—Indictment under the act of March 17th, 1875, for selling intoxicating liquor in a less quantity than a quart, the defendant “not then and there being licensed, according to the laws of Indiana in force at the time, to sell intoxicating liquor at retail.”  
*Held*, on motion to quash, that such allegation of the defendant’s not having procured a license, though not in the words of the statute, was sufficient.  
*The State v. Buckner*, 278
2. *Intoxication in Public Place.*—If a person be found in a state of intoxication at a social party held at the residence of another, he is not thereby rendered liable to prosecution for being found intoxicated in a public place.  
*The State v. Sowers*, 311
3. *Agent of Licensee.*—A license to vend intoxicating liquors is not transferable, but a licensee who has not forfeited his license may carry on the business by an agent at the place designated in the license, and the agent will not be responsible as for selling without license.  
*Runyon v. The State*, 320
4. *Indictment.*—An indictment under the last clause of section 1 of the liquor law of 1875, Acts Spec. Sess. 1875, p. 55, which did not allege that the defendant sold intoxicating liquor to be drank in any of the places named in said section, or that he had no license to sell such liquor to be drank in said places, but alleged that he had no license to sell such liquor to be drank “on the premises,” was bad on motion to quash.  
*Burke v. The State*, 461
5. *Sale or Gift of Intoxicating Liquor to Minor, etc.*—*Constitutional Law.*—It is settled that the sixth section of the act of February 27th, 1873, making it “unlawful for any person, by himself or agent, to sell, barter or give intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated,” was not unconstitutional.  
*Allen v. The State*, 486
6. *Keeping Disorderly House.*—*Indictment.*—An indictment under section 17 of the act of March 17th, 1875 (Acts 1875, Spec. Sess., 58), for keeping in a disorderly manner a house, etc., wherein intoxicating liquors are sold, which, besides averring that the defendant had a license, does not also aver the place to which his license was applicable, and that that place was kept in a disorderly manner, is bad on motion to quash.  
*Davis v. The State*, 488.
7. *Indictment.*—An indictment under section 12 of the liquor law of 1875 (Acts 1875, Spec. Sess., 55) charged that the defendant “did then and there unlawfully sell to” a person named “one gill of intoxicating liquor, for” a sum of money stated, “to be drank upon the premises,” the defendant “not then and there having a license to sell intoxicating liquors to be drank upon the premises,” without alleging that the defendant had not a license to sell intoxicating liquors in a less quantity than a quart at a time, and without other or more particular designation of the place of drinking in the affirmative allegation and the negative averment as to the want of license.  
*Held*, that the indictment was bad on motion to quash.  
*Burke v. The State*, 522

MASTER COMMISSIONER.

See PRACTICE, 2.

MECHANIC’S LIEN.

1. *Materials Furnished to Stranger.*—The sale and delivery of materials to be used in the erection of a building and their use for such purpose could not authorize the seller to acquire a mechanic’s lien on such building and the land whereon it was erected, for the unpaid price of such

materials, where it did not appear that the person to whom the materials were furnished was other than a mere stranger, acting without the knowledge or consent of the owner of the land. *Ogg et al. v. Tate*, 159

### MORTGAGE.

See PRACTICE, 10; SUBROGATION; TAX, 1.

*Deed of Conveyance and Bond for Reconveyance.*—A deed of conveyance of real estate was made by a debtor to his creditor, and at the same time the latter executed to the former a title-bond, conditioned for the reconveyance of the land, if the grantor, within a certain time, should pay the amount of said indebtedness and interest thereon and the taxes on the land; otherwise the grantee should be put in full possession. Upon the death of the grantee, leaving no debts unpaid, his heirs, all being of age, divided his property among themselves without administration.

*Held*, that if the heirs of said grantee, by conveying said land, treated said transaction as a sale and conveyance, they or their assignee could not afterwards treat it as a mortgage.

*Held*, also, that if said grantor delivered up said title-bond to the heirs of the grantee, in consideration of the conveyance by them of a portion of said land to the son of the grantor, this was a confirmation of the original transaction as a sale, and said heirs or their assignee could not afterwards, by foreclosure, treat it as a mortgage.

*Shubert et al. v. Stanley et al.*, 46

### NAME.

See CRIMINAL LAW, 10, 16, 17.

1. *Idem Sonans.*—*Criminal Law.*—Prosecution by affidavit and information for assault and battery, the surname of the defendant being stated in the affidavit as "McGlofin," and in the information as "McLaughlin."

*Held*, that a motion to quash the information for variance in the name was properly overruled. *McLaughlin v. The State*, 476

2. *Recital of Name by Record.*—*Evidence.*—Where the record on appeal recites a name as that of a witness who gave testimony set out, but the name is not contained in what purports to be the statement made by the witness, it does not constitute a part of his testimony. *Ib.*

3. *Evidence.*—Proof of an assault and battery on the person of Mrs. Grubbs could not sustain a prosecution for an assault and battery on the person of Caroline F. Grubbs. *Ib.*

4. *Descriptive Affix.*—*Criminal Law.*—The addition of "Senior" or "Junior" to the name of a person in an indictment is mere matter of description, and the affix forms no part of the name, and need not be proved where proof of the name is necessary. *Allen v. The State*, 486

### NEGLIGENCE.

See PLEADING, 15; RAILROAD, 8, 9, 10; TELEGRAPH, 1, 2.

*Pleading.*—*Injury to Person.*—A complaint against a railroad company to recover damages for an injury to the person of the plaintiff, a child of the age of seven years, caused by the negligence of the defendant's employes in the course of their employment, which failed to show, either by direct averment or by the allegation of facts, that there was no contributory negligence, was bad on demurrer.

*Higgins v. The J., M. & I. R. R. Co.*, 110

## NEW TRIAL.

See COSTS; PRACTICE, 7, 12; SUPREME COURT, 5.

1. *As of Right.—Practice.*—When a motion for a new trial for cause, in an action for the recovery of the possession of real estate, is overruled, and an order is thereupon entered that the party who made such motion shall have a new trial as of right upon payment of costs within one year, such order is nugatory, the maker of such motion not being precluded by the overruling thereof from taking a new trial as of right, as provided by section 601 of the code. *Scranton v. Stewart et al.*, 68
2. *Motion.*—The refusal to award to a party the close of the argument upon the trial of an action, if error, should be assigned as a cause in a motion for a new trial, and cannot constitute an assignment of error on appeal to the Supreme Court. *Abshire v. The State, ex rel. Bickle*, 99
3. *Same.*—“That the court erred in admitting testimony offered by the plaintiff and objected to at the time by the defendant,” is too indefinite a statement of a cause in a motion for a new trial.  
*Heady v. The Vevay, etc., Turnpike Co.*, 117
4. *Same.—Exclusion of Evidence.*—To reserve the question of the improper exclusion of evidence, the particular evidence excluded should be pointed out and identified in a motion for a new trial.  
*Johns v. Hays et al.*, 147
5. *Same.*—Motion for a new trial, “because of errors of the court in admitting evidence at the trial which prevented the defendant from having a fair trial.”  
*Held*, that the cause assigned was too indefinite. *Blakely v. The State*, 161

## OFFICE AND OFFICER.

See CONSTITUTIONAL LAW.

## OPEN AND CLOSE.

See BASTARDY, 2; NEW TRIAL, 2; SUPREME COURT, 5.

## PARENT AND CHILD.

1. *Divorce.—Custody of Children.—Revocation of Order.—Practice.*—In decreeing a divorce, the court gave the custody and guardianship of a minor child of the marriage to the mother until the further order of the court, ordering, among other things, that she should not, without the consent of the court, permanently remove said child beyond its jurisdiction. Afterward, the mother filed a motion in said court to modify the decree so as to give her the custody of the child without condition or restriction as to her place of residence. The father filed an answer, or “cross motion,” asking the court to revoke said order. The mother then withdrew her motion.  
*Held*, that there was no error in refusing to dismiss the motion of the father upon the withdrawal of that of the mother. *Ryce v. Ryce*, 64
2. *Same.*—The mother answered said motion of the father, and, upon the hearing, the court revoked said order, and gave the custody of the child to the father, which action the Supreme Court refused to disturb upon the evidence. *Ib.*

## PARTIES.

See CONTRACT, 2; PLEADING, 4, 8; SCHOOL CORPORATION.

## PARTNERSHIP.

1. *Sale of One Partner's Interest.—Indebtedness of Such Partner to Firm.*—A. and B. being partners, the former owning an undivided five-sixths inter-

est, and the latter an undivided one-sixth interest in the property of the firm, A., by a written agreement, sold his said interest to C., being the undivided five-sixths of certain specified property "and generally all property of every name, or kind, or description, belonging or appertaining to" said firm, with all the interest of A. in all notes and book accounts belonging to said firm, C. paying therefor a certain sum and giving his notes to A. for a balance of the purchase-money, and agreeing to assume and save A. harmless from "all debts, liabilities and contracts of" said firm, growing out of or connected with its partnership business, whether such debts and liabilities appeared on the books of the firm or otherwise; it being agreed that said sale embraced the interest of A. "in all assets of every kind belonging to said firm and appertaining to said partnership business."

*Held*, in an action brought by A. against C. on said notes given for purchase-money, that, in the absence of fraud or warranty as to the interest of A., said sale did not transfer to C. as assets of the partnership a debt due to the firm from A. as a partner, not appearing on the partnership books; and that such indebtedness of A. to the firm could not constitute a set-off or counter-claim in such action on said notes, though at the time of the action the debts of the firm had been paid, and the assets had been divided and the business settled between B. and C., and B. had received his share of said indebtedness of A. to the firm. (DOWNEY and PETTIT, JJ., dissented.)

*Hasselman et al. v. Douglass et al.*, 252

2. *Payment to One Partner.*—Payment of a debt due to a firm may be received by any one of the partners. *Selking v. Jones, Adm'r, et al.*, 409

## PAYMENT.

See PRINCIPAL AND SURETY, 2.

*Satisfaction of Debt by Payment of Smaller Sum.*—A debtor cannot pay and satisfy his debt by the payment of a sum less than the debt; but if the creditor, in order to avoid a suit on an account, of the result of which he is doubtful, agrees to receive any sum in full satisfaction of the amount claimed to be due on the account, and upon such agreement the debtor pays the sum agreed upon, such agreement and payment will completely discharge the debtor from all liability.

*Ogborn et ux. v. Hoffman*, 439

## PLEADING.

See DEMURRER; FRAUD, 2; NEGLIGENCE; PRACTICE, 17; REAL ESTATE, ACTION TO RECOVER; SLANDER AND LIBEL, 1, 4 to 8; STATUTE OF LIMITATIONS, 4.

1. *Action for Partition and to Quiet Title.*—*Answer.*—To an action for partition and to quiet title, an answer alleging that the defendant has been for more than twenty years before the commencement of the action in the exclusive and peaceable possession of the real estate, claiming title by conveyance from the person under whom the plaintiffs claim, is not bad for not alleging that the action was not commenced within twenty years after the cause of action accrued; but it is bad for not alleging that the adverse possession was continuous and uninterrupted.

*Winslow et al. v. Winslow et al.*, 8

2. *Same.*—*Cross Complaint.*—To a complaint for partition and to quiet title, an answer by way of cross complaint, alleging that the ancestor under whom the plaintiffs claim, in consideration of a certain sum of money and for love and affection, agreed to convey the real estate in question to the defendant, and did put him in possession, and that he is still in possession, is good as a cross complaint for the specific performance of the contract.

*Ib.*

3. *Same*.—An answer in such case, by way of cross complaint, alleging that the plaintiffs' ancestor, under whom they claim, gave the real estate in question to the defendant as an advancement, put him in possession, and that he has made lasting and valuable improvements thereon, and paid the taxes, and that he has ever since remained in possession, is bad. *Ib.*
4. *Parties*.—An answer seeking affirmative relief should be in the form of a cross complaint, and where affirmative relief is sought against the plaintiff and the co-defendants, they should be made parties to the cross complaint. *Ib.*
5. *Conditions Precedent*.—In an action to recover damages for the breach of a contract, if the complaint contain a general averment of performance by the plaintiff of conditions precedent, specific allegations of performance are not necessary, under our code.  
*Lowry et al. v. Megee, 107*
6. *Harmless Error*.—There can be no available error in sustaining a demurrer to a paragraph of answer which merely amounts to a partial denial, where an answer of general denial is pleaded. *Ib.*
7. *Demurrer*.—There is no available error in sustaining a demurrer to a paragraph of answer which amounts to no more than a general denial, when there is a remaining paragraph of general denial.  
*Bannister v. The Grassy Fork Ditch'g Ass'n, 178*
8. *Parties*.—*Surplusage*.—Where a cause of action exists in favor of the State, and the action is brought in the name of the State for a certain specified use, the words designating such use will be considered as surplusage, and the action will be regarded as an action brought by the State.  
*The State v. Johnson, Adm'r, 197*
9. *Demurrer*.—*Reply*.—There is no error in sustaining a demurrer to a special paragraph of reply which puts in issue nothing not put in issue by a remaining paragraph of general denial. *Goodwin v. Walls, 268*
10. *Counter-Claim*.—*Injury to Property in Possession of Bailee*.—In an action against the keeper of a livery and feed stable, who had been employed by the plaintiff to keep, feed and take care of his horse, to recover for an injury to said horse, occasioned by said bailee's failure to take proper care of him, the defendant may set up, by way of counter-claim, an indebtedness of the plaintiff to the defendant for the keeping and taking care of said horse under said contract. *Griffin v. Moore, 295*
11. *Fraudulent Conveyance*.—*Answer*.—Complaint by a judgment plaintiff to set aside as fraudulent a conveyance of certain real estate made by the judgment defendant to a trustee, in trust for the grantor, after the accruing of the indebtedness and before judgment, and a conveyance by said trustee to the wife of the judgment debtor, executed after the rendition of the judgment, and to subject said real estate to sale, etc. Answer, admitting said conveyances, but alleging that said first conveyance was in trust for said wife, and averring the payment of a consideration by the wife by the conveyance of her separate real estate, denying notice of the indebtedness of her husband to the plaintiff, and denying fraud.  
*Held, that the answer was sufficient on demurrer.*  
*Wynne et al. v. Cornelison et al., 312*
12. *Demurrer*.—*Harmless Error*.—There can be no available error in sustaining a demurrer to a special paragraph of reply, where all the evidence admissible thereunder is admissible under a remaining paragraph of general denial. *The State, ex rel. Atty Gen'l, v. Giles, 356*
13. *Amended Complaint*.—*Clerk's Certificate*.—A complaint may be an amended one without appearing on its face to be such, and the certifi-

cate of the clerk that the complaint copied by him into the transcript of the record is an amended complaint is conclusive.

*Wyble et al. v. McPheters et al.*, 393

14. *Contract*.—To a complaint alleging a breach of contract to convey an interest in certain leases, in that the defendant had sold the same to other parties, an answer that the title of defendant was absolute and perfect, and the defendant was ready and willing and offered to comply with his contract, may have amounted to an argumentative denial, but, if so, there was no available error in sustaining a demurrer to it, where an answer of denial also was filed.

*Post, Adm'r, v. Pedrick*, 490

15. *Contributory Negligence*.—An allegation in a complaint that a wrong complained of was done without the fault or negligence of the plaintiff is not necessary in a case of trespass, and where the wrong complained of was committed by some positive, affirmative act; it is necessary only where the issue is solely a question of negligence.

*Roll et al. v. The City of Indianapolis*, 547

16. *Contract*.—*Motion for Judgment on Special Finding*.—Where a complaint upon a contract does not allege whether it was by parol or in writing, and no contract or copy thereof is filed with the complaint, it will be regarded as a parol contract. Where, in such case, there is a general verdict for the plaintiff, with a special finding that the contract was in writing, judgment should not be rendered for the defendant upon the special finding because of inconsistency thereof with the general verdict.

*The L., C. & S. W. R. W. Co. v. Wray*, 578

17. *Statute of Another State*.—*Judicial Notice*.—The courts of this State cannot take judicial notice of the statutes of another state, and where a cause of action is founded on a statute of another state, such statute must be set out by filing a copy thereof with the complaint.

*Tyler v. Kent*, 583

#### POOR.

See ATTORNEY, 1, 2.

#### PRACTICE.

See BILL OF EXCEPTIONS; NEW TRIAL; PARENT AND CHILD, 1; PLEADING, 16; SUPREME COURT.

1. *Immaterial Issue*.—Where a paragraph of answer in confession and avoidance is bad, and no demurrer thereto is filed, but issue is taken thereon, and, upon the trial, its allegations are proved to be true, it does not follow that the finding should be for the defendant, but such immaterial issue should be disregarded.

*The Western Union Telegraph Co. v. Fenton*, 1

2. *Master Commissioner*.—*Report*.—By an agreement, entered of record, and an order of court thereon, a cause was submitted to a master commissioner, under the act of March 2d, 1853, 1 G. & H. 433, to report the evidence and his findings at the next term. He made a report which did not contain the evidence, though there was evidence given before him.

*Held*, that, for such failure to report the evidence as required, the report, upon exception and motion, should have been set aside.

*McGillis et al. v. Slattery*, 44

3. *Appeal*.—*Objections to Evidence*.—The ground of an objection to evidence must be stated in the court below, and shown by bill of exceptions to have been so stated, or the objection will not be noticed on appeal.

*Miller v. The Wild Cat Gravel Road Co.*, 51

*The State, ex rel. Atty General, v. Wilson*, 166

4. *Husband and Wife*.—*Action Founded on Tort of Wife*.—*Death of Husband Before Judgment*.—Action against husband and wife for slanderous

words spoken by the wife; after verdict and before further proceedings, the male defendant died, and his death was suggested to the court.

*Held*, that the widow was liable to judgment against her alone.

*Summan v. Brewin*, 140

5. *Striking out Pleading.—Bill of Exceptions.*—A pleading which has been struck out by the court cannot again be made a part of the record, except by being set out in a bill of exceptions. *Watts v. Coxen*, 155

6. *Same.*—There is no error in striking out a paragraph of an answer in which there is contained no matter which is not admissible under remaining paragraphs of such answer. *Ib.*

7. *New Trial.—Request to Instruct Jury in Writing.*—It is a good cause for a new trial, that the court, having been requested to instruct the jury in writing, gave a portion of the instructions orally. *Ib.*

8. *Evidence.—Judicial Discretion.*—It is discretionary with the court to permit the plaintiff to introduce proper evidence, over defendant's objection, after the close of the evidence and the argument in the cause, except the plaintiff's closing argument; and it will be presumed that evidence so introduced was competent, in the absence of a contrary showing. *The Board of Comm'rs of Henry Co. v. Slatter et ux.*, 171

9. *Docketing of Causes.*—Where a cause had been docketed by the clerk for a certain day of the term, and it was called for trial on an earlier day, the plaintiff not being ready for trial on that day, having caused his witnesses to be subpoenaed for the day to which the cause was set on the docket, it was error to thereupon dismiss the action over the plaintiff's objection; and it was not necessary, in order to present such ruling to the Supreme Court, that any opportunity should be offered to the lower court, by motion or otherwise, to review or reconsider its action. *Lines v. Benner*, 195

10. *Action to Compel Foreclosure of Mortgage.—Jurisdiction.—Interpleader.—Process.*—A., the owner in fee simple of certain real estate, on which there were two mortgages, one executed by A. to B., a former owner, and a prior one executed by B. to C., who was B.'s vendor, brought an action in the county wherein said real estate was situated, against B. and C., to compel the defendants to interplead and litigate matters in dispute between them in regard to said prior mortgage, and to cause satisfaction of said mortgages to be entered.

*Held*, that the court was not deprived of jurisdiction of C. because he resided in another county.

*Held*, also, that the complaint in such action was not bad on demurrer because there was no affidavit attached thereto denying collusion of the plaintiff with either of the defendants.

*Held*, also, that the defendants having been brought into court to interplead, no further process was necessary against C. upon the filing of a cross complaint by B. *Nofsinger v. Reynolds et al.*, 219

11. *Bill of Exceptions.—Time of Filing.*—Preceding a bill of exceptions in the transcript of the record on appeal was the following: "Nofsinger's bill of Ex., No. 7, filed Nov. 13th, 1871."

*Held*, said date being within the time allowed for the filing, that it was sufficiently shown that the bill was filed, and that it was filed in time. *Ib.*

12. *Motion for New Trial.—Instructions to Jury.—Bill of Exceptions.*—A cause assigned in a motion for a new trial was, "error in refusing to give to the jury instructions numbered one to eleven inclusive, asked by the defendant, as shown by his bill of exceptions." The bill of exceptions was not yet filed.

*Held*, that the cause assigned was sufficiently definite, without the aid of the bill of exceptions. *Ib.*

13. *Exceptions.—Instructions to Jury.*—In a bill of exceptions, following certain instructions to the jury given by the court, were certain instructions signed by counsel, immediately preceded by a statement that they were asked by the defendant and refused by the court, after which instructions refused was the following: "To the giving of each of which instructions and the refusal to give those asked, defendant at the time objected and excepted."  
*Held*, that the exception was not too general or indefinite, but was properly taken. *Ib.*
14. *Exclusion of Evidence.—Exception.*—Where, upon the trial of an action, an objection to a question propounded to a witness has been sustained, an exception to the ruling cannot be made available on appeal where it is not shown what was the ground of objection, or that the party asking the question stated to the court what facts he proposed or expected to establish by the answer to the question.  
*The B., P. & C. R. R. Co. v. Lansing, 229*
15. *Interrogatories to Jury.—When to be Presented to Court.*—When interrogatories to be propounded to the jury have been presented to the court by a party after the commencement of the argument of the cause, there is no error in refusing to submit them to the jury.  
*Glasgow et al. v. Hobbs et al., 239*
16. *Instructions to Jury.—Record.*—Where an instruction given to the jury was not incorporated in a bill of exceptions, or signed by the judge or by the attorney of the defendant, there being at the bottom of it the words "given and excepted to," signed by the attorney of the plaintiff;  
*Held*, on appeal by the plaintiff, that the instruction could not be regarded as a part of the record. *Bingham v. Elmore, 252*
17. *Bill of Particulars.—Motion to Make More Specific.*—Where, in a bill of particulars filed with a pleading, the account set out consisted of the fees of a district attorney in a number of cases, and the items were merely statements of the names of the parties in each case, with the amount of the fee carried out in figures, a motion of the adverse party to require the pleader to make such bill more specific, by giving the dates of the prosecutions and the courts in which they were prosecuted, it was held, presented a reasonable request, and should have been sustained. *Goodwin v. Walls, 268*
18. *Interrogatories to Jury.*—A jury can be directed to answer interrogatories only on condition that they find a general verdict.  
*Hodgson v. Jeffries, 334*
19. *Setting Aside Judgment and Finding, and Making Another Finding, Without Motion.*—Upon the trial of a cause by the court, there was a general finding for the defendant, and final judgment for costs was rendered against the plaintiff, and several days afterwards the court, without request from either party to make a special finding before made, without any motion for a new trial, and without any written motion made in the cause, set aside said judgment and general finding, and, over the objection of the defendant, without hearing evidence or having a new trial, made a special finding in favor of the plaintiff.  
*Held*, that such a practice could not be sustained. *Martindale v. Palmer, 411*
20. *Instructions to Jury.*—When a court, in its instructions to a jury, has fully presented the questions involved in the cause on trial, giving them all the information necessary to a full understanding of the law of the case, it is not error to refuse to give other instructions asked by a party, though they be correct. *DeCamp et al. v. Atward, 468*
21. *Motion for Judgment on Special Findings.*—Where the special findings of a jury, in answer to interrogatories, do not embrace and cover all the issues, and are not inconsistent with a general verdict rendered for

the plaintiff, as to issues not covered by them, the defendant will not be entitled to judgment thereon, though they be inconsistent with the general verdict as to the issues covered by them.

*The T., W. & W. R. W. Co. v. Milligan*, 505

22. *Supreme Court.—Appeal in Name of Deceased Party.—Motion to Set Aside Judgment After Term.—Assignment During Pendency of Action.*—After the death of the plaintiff in an action, an appeal was taken to the Supreme Court from a judgment rendered against him in said action, error being assigned by counsel in the name of said plaintiff, and a joinder in error being filed in behalf of the defendant by counsel, and there was judgment of reversal and for costs in favor of said plaintiff, the counsel who assigned error and the defendant and his counsel being ignorant of the death of said plaintiff until after the rendition of said judgment of reversal.

*Held*, that if said judgment of reversal was not void, the Supreme Court never having acquired jurisdiction of said plaintiff, it was erroneous in fact and voidable, and, whether void or voidable, it ought to be set aside upon motion of the defendant, though such motion was not filed until after the expiration of the term at which said judgment of reversal was rendered.

*Held*, also, that said appeal could not be prosecuted in the name of said plaintiff by one to whom, during the pendency of the action in the court below, the plaintiff had made a written assignment of the cause of action.

*Taylor v. Elliott et al.*, 588

23. *Construction of Statute.—Transfer of Interest.*—The provision of section 21 of the code, 2 G. & H. 51, that, in case of any transfer of interest, other than such as arises from the death, marriage or other disability of a party, "the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action," means that when such transfer of interest is made, the action may be continued in the name of the original party if he be living, but does not mean that it may be continued in his name after he is dead.

*Ib.*

## PRINCIPAL AND SURETY.

1. *Indemnity to Co-surety.*—Where a surety received from the principal debtor an indemnifying chattel mortgage, a co-surety could have no right of action against said mortgagee for failing to cause said mortgage to be recorded, if it was taken upon an agreement that it should not be placed on record.

*White v. Carlton*, 371

2. *Payment by Negotiable Note.—Contribution.*—The satisfaction of a debt by a surety by giving his own note, governed by the law merchant, to the creditor, is such a payment as will authorize such surety to sue a co-surety for contribution.

*Ib.*

3. *Bank.—Deposit Under Special Agreement.*—A person, who was indebted as principal upon a promissory note to a banking firm, after the maturity thereof, deposited in the bank of said firm, where said note was payable, and checked out, sums amounting to more than said indebtedness, under a special agreement between the depositor and the bank that the former should buy cattle and give the sellers checks payable or to be presented after the buyer had sold the cattle and deposited the proceeds in the bank, and that the bank should apply the money so deposited to the payment of such checks exclusively.

*Held*, that the money so deposited could not have been applied by the bank to the payment of said note, and that a surety thereon, who was not a party to said agreement, was not released by the failure of the bank to so apply said deposits.

*Wilson et al. v. Dawson et al.*, 513

## INDEX.

## PROCESS.

See PRACTICE, 10.

## PUBLIC POLICY.

See CONTRACT, 3, 4.

## RAILROAD.

See CITY, 9, 10; DAMAGES, 2; NEGLIGENCE.

1. *Width of Right of Way Appropriated.—Erection of Telegraph Poles.—Additional Appropriation of Land.*—By the original charter of a railroad company granted in 1846, the president and directors thereof were invested with all the rights and powers necessary for the construction and repair of a railroad between certain places named, within this State, "not exceeding sixty feet wide;" an amended charter enacted in 1849, before the construction of its road by said company, which did not expressly repeal any portion of the original charter, provided that "for the purpose of constructing said road, with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon," said company was authorized "to enter upon, take and hold in fee simple all real estate and materials necessary for that purpose, doing no unnecessary damage;" the qualifying words, "not exceeding sixty feet wide," contained in the original charter, not being inserted in the amended charter, which provided that said company should, within ten years, sell and dispose of all lands granted, conveyed or released to it, "except so much as may be embraced in the width of the road allowed by the charter," etc., and also provided that when such real estate and materials necessary for such purpose could not be had by donation or fair purchase, the owner was authorized to have the damages assessed in a mode therein provided, and that all claims for damages should cease unless applied for in two years next after the company had taken possession of such real estate or materials. Said company, by its agents, entered upon and took possession of certain land, without donation, purchase, condemnation, assessment of damages or claim therefor made by the owner, but with his acquiescence; and said company constructed its railroad over said land, and erected telegraph poles, with wires thereon, on one side of said railroad, at the distance of nineteen feet from the center of the track.

*Held*, that, construing the amended charter in connection with the original charter and with the whole current of legislation in this State regulating the right of eminent domain by uniformly fixing a limit to the width of the right of way, the amended charter did not enlarge the width of the right of way, as defined by the original charter.

*Held*, also, that while said company might have acquired title to sixty feet in width of said land, if it had taken possession thereof and occupied such space; yet, having appropriated and used less than that width, its right being limited by its necessities to the extent that it occupied and used, it became entitled, not merely to the strip of ground on which the railroad track was constructed and the ground actually occupied by said telegraph poles, but, also, to the amount of land necessary for the purpose of constructing its road, with all necessary appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, including sufficient land for the erection of telegraph poles at a safe distance from the track, together with the right to the exclusive use of the intervening space between said track and the fixture or appendage so erected.

*Held*, also, said company having so erected telegraph poles on but one side of its road and made no use of the other side, except for the purpose

of keeping its track in repair, for a period of eighteen years from the time of the original appropriation, that said company possessed no right to erect telegraph poles on said other side of its track at the distance of twenty-nine feet from the center thereof, without condemnation and payment of damages in the mode provided by the law or charter by which such railroad was governed at the time of such new appropriation. *Prather v. The J., M. & I. R. R. Co. et al.*, 16

2. *Appropriation of Land.—Evidence.*—In a proceeding to condemn and appropriate land for the way of a railroad company, the inquiry as to the value of the land should relate to the time of the appropriation, and not to the time of the trial of such proceeding.

*The L., C. & S. W. R. W. Co. v. Buchanan*, 163

3. *Same.—Practice.—Waiver.*—If such a proceeding may be dismissed, on the motion of the land-owner, because the instrument of appropriation deposited with the clerk of the circuit court, as provided in section 15, 1 G. & H. 509, is not signed by any person in behalf of the railroad company, such objection will be waived if not made until a late stage of the proceeding. *Ib.*

4. *Appropriation of Land.—Damages.*—On the trial of a proceeding to condemn land for the track of a railroad, it was not error to instruct the jury that the land-owner was entitled, as damages, to the value of the land actually taken, to which might be added any injury to the residue of the land naturally resulting from the appropriation and the construction and operation of the road thereon, such as cutting the fields into inconvenient and ill shape, and destroying means of communication between different portions of the farm, the company not being required to furnish any crossing other than highway crossings, but being entitled to exclusive possession of the strip taken; and that the jury might consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already inclosed, as the company was not legally obliged to fence the railway track, except so far as it might choose to do so for the protection of its own interests, the law simply imposing on the company the obligation to pay for animals killed by it on its track where it was not, but might have been securely fenced. *The B., P. & C. R. R. Co. v. Lansing*, 229

5. *Assessment of Damages to Land-Owner.*—A proceeding to assess against a railroad company damages sustained by a land-owner from the appropriation of his land for the construction of the railroad of such company cannot be maintained by such owner, under sec. 15, 1 G. & H. 509, where there has not been an instrument of appropriation filed by the company, as provided in said section.

*The I., B. & W. R. W. Co. v. Reed et al.*, 357

6. *Street.*—A railroad company is liable in damages for injury occasioned by reason of the construction of a raised railroad track along a street of a city, thereby causing the water from rains and freshets to flow upon adjacent real estate, and also for injury occasioned by reason of the construction of an embankment, on a street approaching a street crossing of said track, in front of a lot in a city occupied by a dwelling-house, thereby rendering the approach to the lot in the front on such street impossible for carriages, wagons and vehicles and inconvenient for foot-passengers. *The I., B. & W. R. W. Co. v. Smith et ux.*, 428

7. *Jurisdiction.—Injury to Animals.—Action Under Statute.—Practice.*—In an action, under the statute, against a railroad company, to recover for the killing or injuring of animals by a passing train, the complaint should aver that the animals were killed or injured in the county where the action is brought. If such averment be omitted, the objection to the complaint may be raised by answer or by demurrer assigning want of jurisdiction, but not by demurrer assigning failure to state facts sufficient. If the question of jurisdiction be not so raised, it is not waived,

but the objection may be raised by motion in arrest of judgment. The failure to prove such fact is not a ground for a motion in arrest of judgment.

*The T., W. & W. R. W. Co. v. Milligan*, 506

8. *Same.—Action as at Common Law.*—An action against a railroad company, based on its common law liability for negligently killing or injuring animals, is a transitory action, and may be brought in any county through which the railroad passes. *Ib.*

9. *Negligence.—Injury to Animals.*—The owner of horses left them in a pasture adjoining a railroad which was securely fenced, and went to another state, not leaving any person to look after the horses, which went upon the railroad track, through a gate which had been recently left open by trespassers, and the horses were negligently injured by a passing train.

*Held*, that the owner of the horses was not guilty of contributory negligence. *Ib.*

10. *Same.*—Upon the approach of the railroad train to said horses, they ran along the side of the track a long distance, and were forced upon the track by an embankment, and were driven into a bridge, and some of them were injured by the train, its speed not having been diminished, but having been increased; and the remaining horses were injured on the bridge by another train which followed in a few minutes, the engineer of which did not discover the horses until he was near them, though the conductor jumped off the train, and the fireman deserted his post, and when the signal was given there was no person to apply the brakes.

*Held*, that the railroad company was guilty of negligence. *Ib.*

11. *Diligence of Passenger.*—It is the duty of a person about to take passage on a railway train to inform himself when, where and how he can go or stop, according to the regulations of the railway company; and if he make a mistake, not induced by the company, against which ordinary diligence would have protected him, he has no remedy for the consequences against the company.

*The O. & M. R. W. Co. v. Applewhite*, 540

12. *Same.—Refusal to Stop Train Contrary to Regulations.*—Where a person who had purchased of a railroad company a ticket for passage to a certain station, by his own fault or mistake got upon a train which, by the regulations of the company, did not stop at that station, he could not recover damages of the company for the refusal and failure of the conductor to stop the train and let him off at said station. *Ib.*

## REAL ESTATE, ACTION TO RECOVER.

See NEW TRIAL, 1.

*Pleading.*—In an action for the recovery of the possession of real estate, under an answer of general denial, all defences and all matters of reply may be given in evidence.

*Tracy et al. v. Kelley*, 535

## REFORMATORY INSTITUTION FOR WOMEN AND GIRLS.

See CRIMINAL LAW, 18.

## REPORTS OF SUPREME COURT.

*Price.*—The limitation fixed by the act of March 13th, 1875, of the price at which the reports of the Supreme Court of Indiana published under that act may be sold by others than the reporter is valid; and no more than three dollars per copy can be recovered for such reports by any seller thereof, though the buyer may have contracted to pay a higher price.

*Welling v. Merrill et al.*, 350

SALE.

*Refusal to Accept Goods.—Conversion.—Statute of Limitations.*—Under a contract for the sale of a quantity of wine, the vender delivered to a carrier, to be transported to the buyer, wine, which on its arrival the buyer refused to accept, because it was not of the quality contracted for, and the buyer, after corresponding with the vender, took the wine from the carrier, and stored it in his cellar, subject to the order of the vender. Said buyer died, and his successor in business sold the wine to other persons.

*Held*, that the property in the wine did not pass to said buyer, the administrator of whose estate would not be liable therefor to the vender; but said successor of the buyer was liable to said vender for the wrongful conversion.

*Held*, also, that the statute of limitations did not commence to run against said vender in favor of said successor of the buyer until the time of the conversion.  
*Bishplinghoff et al. v. Bauer*, 519

SCHOOL CORPORATION.

See TOWNSHIP, 1, 2.

*Parties.*—An action to recover for materials furnished and services rendered by the plaintiff in the erection of a school-house, under the employment of the school trustees of a city, should be brought, not against such trustees, but against the school corporation, by the name and style of "The School City of —," filling the blank with the name of the city.  
*Sims et al. v. McClure et al.*, 267

SCHOOL LAW.

*Amendment of Statute.*—The act of March 8th, 1873, amending sections 33, 37, 39 and 43 of the common school law of March 6th, 1865, is still in force, and the act of March 9th, 1875, purporting to amend the same sections (which, having been amended by said act of 1873, had ceased to exist, and therefore were not subject to amendment), is void.  
*The Board of Comm'rs of Marion Co. v. Smith*, 420

SHERIFF'S SALE.

See EVIDENCE, 8.

1. *Redemption of Real Estate. — Rents and Profits.* — Where the rents and profits of real estate for a term of years, not exceeding seven years, are sold by the sheriff on execution, the interest so sold may be redeemed within one year from the date of the sale, under the provisions of the act of June 4th, 1861, 2 G. & H. 251, and the purchaser at such sale is not entitled to possession during such period; the provisions of said act being applicable in such case, as well as where the fee simple is so sold.  
*Ragsdale et al. v. Mathes*, 495
2. *Property Sold Subject to Incumbrance.—Redemption Law of 1861.* — The provision of the first clause of section 452, 2 G. & H. 244, that "when any property shall be sold subject to liens and incumbrances, the purchaser may pay the liens and incumbrances, and hold the property discharged from all claims of the execution-defendant," is not repealed by the redemption law of 1861, 2 G. & H. 251, so far as it affects the right of redemption existing by the general principles of law and held by one not a party to the judgment on which the sale was made.  
*Gatling v. Dunn et al.*, 498
3. *Same.—Sale Under Junior Judgment.* — Certain real estate subject to the lien of two judgments, rendered in favor of different plaintiffs at different times, against the owner of such real estate, was sold on execution issued on the junior judgment to one not a party to either judgment,

who, after he had received the sheriff's deed, sold and conveyed the land to the senior judgment-plaintiff, who took and kept possession of the land, still holding said senior judgment, which remained unpaid and unsatisfied on the record.

*Held*, that said senior judgment remained in force against the land and against the judgment-defendant, and execution might be issued thereon, notwithstanding said purchaser at sheriff's sale elected, in his mind or in expressed words, to take and hold the land subject to said senior judgment, and to pay off and satisfy the same, and hold the property, and his vendee, said senior judgment-plaintiff, purchased with notice of such election, himself electing in like manner. *Ib.*

4. *Redemption of Land. — Statutes.* — There is no common law right to redeem land sold on a judgment at law, where the lien is general; and the provision of the second clause of section 452, 2 G. & H. 244, that the purchaser of property sold subject to liens and incumbrances "may hold the property subject to be redeemed," without limitation as to time, "by the execution-defendant, his heirs or assigns, by paying to the purchaser, his heirs or assigns, the purchase-money, with interest" at the legal rate of six per cent. per annum, was repealed by the act of 1861, 2 G. & H. 251, which provides that the redemption must be within one year from the date of the sale, by paying the purchase-money, with interest thereon at the rate of ten per cent. per annum. *Ib.*

#### SLANDER AND LIBEL.

See AMENDMENT, I; STATUTE OF LIMITATIONS, I.

1. *Pleading. — Justification.* — In an action by a female for slanderous words containing a general imputation of whoredom against the plaintiff, an answer of justification was bad which, not alleging any specific act of whoredom on the part of the plaintiff, alleged that she was of notorious bad character for chastity, and that the words charged in the complaint were true. *Sunman v. Brewin*, 140
2. *Words. — Provincial Meaning.* — Words not slanderous *per se* spoken concerning a woman, which at the time and place have, when spoken of a woman, a provincial meaning imputing to her the keeping of a whore-house, and which are spoken in such provincial sense and are so understood by the persons to whom they are spoken, are actionable. *Lipprant v. Lipprant*, 273
3. *Evidence.* — On the trial of an action for slander, there was no error in refusing to permit the defendant to prove that, about the time of the commencement of said action, the plaintiff said she intended to bring suits against the defendant and prosecute the same until she broke him up. *Ib.*
4. *Perjury. — Pleading.* — A charge of perjury, to be actionable, need not set forth the particulars of the supposed crime with the certainty required in an indictment for that offence. *Downey v. Dillon*, 442
5. *Same. — Pleading.* — A charge of false swearing in testimony given on a trial before a competent tribunal—as a circuit court—is actionable, and the materiality of the testimony will be presumed, and need not be averred in a complaint for libel or slander. *Ib.*
6. *Same. — Answer. — Practice.* — An answer to a complaint for libel, based on a charge of perjury, which contains no defence except a denial of malice, may be struck out where an answer of general denial is filed. *Ib.*
7. *Same. — Justification. — Practice.* — An answer in justification of a libel imputing perjury, which relies upon the truth of the words published, but does not aver that the words were true in the sense imputed to them in the complaint, is bad. *Ib.*
8. *Same.* — An answer in justification of an alleged slander charging perjury in testimony given on a trial, which sets out, as material, testimony given by the plaintiff on such trial, and alleges it to have been false,

but does not allege that it was known to the witness to be false, or that it was wilfully and corruptly given, is bad on demurrer; such answer must allege facts sufficient to constitute the crime of perjury. *Id.*

9. *Same.—Evidence.*—On the trial of an action of libel based on a charge imputing perjury, evidence that the defendant had always before the publication directed his son to treat the plaintiff kindly is inadmissible, as not being confined to a period near the publication. It is incompetent, on such trial, to prove that the testimony on the trial wherein the perjury is alleged to have been committed was commented on by the jury in that case. *Id.*
10. *Evidence of General Character.*—In an action of slander or libel based on a charge imputing a crime, where there is an answer of justification; with evidence on the trial to sustain it, the plaintiff may prove his general character in rebuttal. *Id.*

#### SPECIAL FINDING.

See SUPREME COURT, 9.

#### STATUTE OF FRAUDS.

*Contract for Sale of Land.—Description.*—A contract for the sale of land must so far describe the land that it may be identified without resort to parol evidence. Therefore a written contract for the payment of a certain sum for "the one hundred and twenty acres of land in Shannon county, Missouri," at a certain date, "provided it is not sold before that time," could not be enforced. *Miller v. Campbell, 125*

#### STATUTE OF LIMITATIONS.

See PLEADING, 1; SALE.

1. *Slander.—Infancy of Plaintiff.*—To a complaint for slander, alleging the infancy of the plaintiff, it is not a good answer that the defendant has not been guilty within two years next before the commencement of the action. *Sunman v. Brewin, 140*
2. *Concealment of Cause of Action.—Fraud.*—The provision of the statute that, if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute. *Wynne et al. v. Cornelison et al., 312*
3. *Same.—Pleading.*—To an answer of the statute of limitations, a reply which relies on the defendant's concealment of his liability to an action must allege the acts of concealment, as mere silence does not amount to the concealment contemplated by the statute, 2 G. & H. §62, sec. 219. *The State, ex rel. Atty Gen'l, v. Giles, 356*
4. *Pleading. — Answer.*—An answer which, instead of alleging that the cause of action did not accrue within the prescribed period before the commencement of the action, alleges that the defendant did not, at any time within the prescribed period before the commencement of the action, undertake, promise or agree, etc., is bad as an answer of the statute of limitations. *McCollister v. Willey, 382*
5. *Recovery of Possession of Real Estate.*—To a complaint for the recovery of the possession of real estate on the ground that a deed of conveyance thereof, executed by the plaintiff to the defendant, was intended as a mortgage, and that the debt secured thereby has been paid, an answer of the statute of limitation of six years is bad. *Helton v. Martin, 529*

## SUBROGATION.

*Equitable Assignee of Mortgage.*—A. mortgaged certain land to B., a school commissioner, to secure the payment of a loan from the school fund. Upon default, B. sold the land to C. at public sale, to pay the debt. C. sold and conveyed it, with covenants of warranty, to D., who took possession. At the suit of the heirs of A., the sale made by B. was declared void, and said heirs recovered possession. D. then sued the heirs of C. on said covenants of warranty, and recovered judgment against them, which they paid. The heirs of A. afterwards conveyed the land to E., who conveyed to F., said E. and F. having notice of all said proceedings.

*Held*, in an action brought by the heirs of C. against E. and F., for the sale of the land to pay the amount of the mortgage, that said heirs of C. were entitled to be regarded as the equitable assignees of the mortgage, and to be subrogated to the rights of the mortgagee.

*Held*, also, that the complaint of the heirs of C. against E. and F. was not bad on demurrer for not alleging facts showing that said heirs of C. were, as such heirs, actually liable to D. for the breach of said covenants of warranty in the deed made by C. to D., though E. and F. were not parties to said action of D. on said covenants.

*Muir et al. v. Berkshire et al.*, 149

## SUPERIOR COURT.

See SUPREME COURT, 10.

## SUPREME COURT.

See BILL OF EXCEPTIONS; PRACTICE, 3, 22.

*Notice to Co-parties.* See HENRY v. HUNT, 114.

1. *Evidence.*—The Supreme Court will not reverse a judgment upon the weight of oral evidence. *Blakely v. The State*, 161
2. *Assignment of Error.*—On appeal to the Supreme Court, causes for a new trial cannot properly be assigned as errors. *Goodwin v. Walls*, 268
3. *Exception.—Demurrer.*—The action of a court in overruling a demurrer cannot be presented to the Supreme Court, where no exception has been taken to the ruling. *Hendricks, Gov., v. Hargrave*, 327
4. *Overruling Motion for Rejection of Pleading.—Record.*—The action of a court in overruling a motion to reject a pleading filed cannot be presented to the Supreme Court when the motion is not in the record, or when the ruling has not been reserved by a bill of exceptions. *Lee, Adm'r, v. Carter*, 342
5. *Assignment of Error.—Motion for New Trial.—Open and Close.*—Error in allowing a party to open and close is a cause for a new trial, and on appeal can not properly be assigned as error. *White v. Carlton*, 371
6. *Same.—Sufficiency of Complaint.*—If any paragraph of a complaint containing several paragraphs be sufficient, a judgment for which such paragraph forms a proper foundation will not be reversed by the Supreme Court on an assignment of error that the several paragraphs of the complaint, specifying them by their numbers, do not either of them state facts sufficient to constitute a cause of action. *McCollister v. Willey*, 382
7. *Record.—Bastardy.—Plea.*—Where, in a bastardy proceeding, there has been a trial by jury, and the defendant has had all the benefit of a denial of the charge, he cannot, on appeal to the Supreme Court, object to the judgment against him because the transcript of the record shows no formal plea filed by him, and none entered of record in his behalf. *McReynolds v. The State, ex rel. Freeman*, 391
8. *Same.—Nunc Pro Tunc Entry.—Notice.*—Where, upon the hearing of a

motion of a party to correct the record of an action by a *nunc pro tunc* entry, it is proved that the adverse party has had notice of the motion, and this is shown by the transcript of the record on appeal to the Supreme Court, it is not necessary that the notice itself and the service thereon should be incorporated in the record. *Ib.*

9. *Assignment of Error.—Special Finding.*—Where the court, at the request of a party to an action, has stated the facts in writing and the conclusions of law upon them, no question as to the correctness of the conclusions of law will be presented on appeal by assigning as error that the court erred in its special finding. *Selking v. Jones, Adm'r, et al.*, 409
10. *Same.—Superior Court.*—On an appeal from a superior court to the Supreme Court, only such questions can be considered as were presented by the assignment of errors in the general term of the lower court. *Ib.*
11. *Evidence.—Instructions to Jury.*—Where, on appeal to the Supreme Court in a criminal action, it does not appear by bill of exceptions that all the evidence is in the record, the question as to whether the verdict is contrary to the evidence cannot be considered; and the judgment cannot be reversed on instructions given to the jury which might have been right under evidence that might have been legally and properly given on the trial. *Ward v. The State*, 454
12. *Same.*—Where, on appeal to the Supreme Court in a criminal action, all the evidence is not in the record, the judgment against the defendant will not be reversed because of the admission of evidence set out in the record, which, though otherwise inadmissible, might have been rendered competent by other admissible evidence not in the record. *Wiley v. The State*, 475
13. *Assignment of Error.*—On appeal to the Supreme Court, an assignment of error that the damages are excessive is a nullity. *The T., W. & W. R. W. Co. v. Milligan*, 505
14. *Objection to Evidence.*—The Supreme Court will not consider the question of the admissibility of evidence admitted over objection, when it does not appear that any specific objection to such evidence was pointed out to the court below. *Bishplinghoff et al. v. Bauer*, 519
15. *Evidence.*—Where the evidence is not properly in the record, the Supreme Court will not consider the evidence, or instructions given to the jury with reference to the evidence, unless they are injurious to the party complaining of them under any state of the evidence admissible. *Helton v. Martin*, 529

## TAX.

See DOMICIL, 1, 2, 3.

1. *Mortgage.—Crop Raised by Heirs of the Mortgagor after Foreclosure.*—A mortgage on real estate was foreclosed, and the real estate was sold under the decree of foreclosure to the mortgagee. Thereafter the mortgagor died, and afterwards a crop of corn was planted and cultivated on said land by the widow and son of the mortgagor, which fully matured before the year for the redemption of the land had expired. *Held*, that said corn was not liable for the payment of taxes chargeable against the mortgagor. *Gregory et al. v. Wilson et al.*, 233
2. *Seizure of Property.*—A county treasurer could not legally seize property for taxes of the year 1873, until after the third Monday of April, 1874. *Ib.*
3. *Tax on Land Sold Under Decree of Foreclosure.*—The purchaser of real estate under a decree of foreclosure of a mortgage, who, after the conveyance thereof to him by the sheriff, to prevent the sale of such land, has paid taxes accrued and properly charged, prior to said sale, against one who was the owner in fee of said land, subject to said

decree and mortgage, which taxes constituted a lien upon said land, cannot, without showing a warranty in said mortgage or any contract of the mortgagor to pay the taxes that might accrue on the mortgaged premises, recover of said owner the amount of the taxes so paid.

*Semans v. Harvey*, 331

#### TELEGRAPH.

See RAILROAD, 1.

1. *Negligence.—Statute.—Damages.*—Suit against a telegraph company to recover damages for negligence of the defendant in failing to deliver, within a reasonable time, a telegram directed from a place without this State to the plaintiff at a place within this State, because of which negligence the plaintiff failed to obtain employment as a steamboat pilot at certain wages per month, for a trip, and, if he sued, for the season, he not obtaining employment for some time thereafter, and the sender of said message not acting as the plaintiff's agent in sending it.

*Held*, that, under our statute, the plaintiff might recover, though the relation of contractors did not exist between him and the telegraph company.

*Held*, also, that the damages sought by said action were not remote or speculative.

*The Western Union Telegraph Co. v. Fenton*, 1

2. *Same.—Stipulation for Repeating Message.*—A telegraphic dispatch was sent under stipulations, agreed to by the sender, providing for repeating messages at one-half the usual rates in addition, and that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeatd message, beyond the amount received for sending the same, and the sender did not order the repeating of the message, or pay or offer to pay for repeating it, but paid merely the regular rate.

*Held*, that these facts could constitute no defence to an action brought by the person to whom the message was sent against the telegraph company for negligence of the defendant in failing to deliver the message in a reasonable time, the making prompt delivery dependent on such repetition being unreasonable, and the company, like a common carrier, being unable to contract against liability for its own negligence, and the action being based upon the statute, and not upon contract between the parties.

*Id.*

#### TOWNSHIP.

1. *Civil and School Townships.*—When a township is mentioned by name, without the designation "school," it must be understood to be the corporation the purpose of which is the transaction of ordinary township business, to which the term "civil" is sometimes applied, and which is a corporation entirely distinct from that of the school township existing in the same territory.

*McLaughlin v. Shelby Twp*, 114

2. *Same.—Contract for Erection of School-House.*—A civil township has no authority to make a contract for the erection of a school house; and if it sue on a contract for the erection of a school-house, the complaint, though it may state a good cause of action in favor of the school township, will be bad on demurrer.

*Id.*

#### TRUST AND TRUSTEE.

1. *Resulting Trust.*—Where a person caused certain land to be conveyed to another, the consideration moving from the former, upon an agreement that the latter should sell and convey the land and with the proceeds pay certain debts of the former, and account to him for the residue;

*Held*, that the trust was valid, as a resulting trust, without any declaration or acknowledgment thereof in writing.

*Held*, also, that, the trustee having sold and conveyed the land to a third person, and having received the purchase-money, and having paid a portion thereof in discharge of said debts and a part of the residue to

the *cestui que trust*, the remaining part, which he refused to pay, might be recovered in an action against him by the *cestui que trust*.

*McCollister v. Willey*, 382

2. *Gift Inter Vivos*.—A person delivered certain United States bonds and money to another, with directions for the latter to give the same to certain children of the former upon his death, and the person to whom said bonds and money were so delivered received them and agreed to execute the trust.

*Held*, that this was a sufficient delivery to constitute a gift *inter vivos*, and that, upon the death of the donor, an action would lie in favor of said children, against said trustee, upon his refusal to execute the trust, and against the administrator of the estate of the donor, to whom said trustee had delivered said bonds and money, it not appearing that the donation was void as against creditors.

*Wyble et al. v. McPheters et al.*, 393

3. *Resulting Trust*.—*Husband and Wife*.—Where a husband fraudulently takes a conveyance of land in his own name, the consideration having been paid by his wife, a trust thereby results in the wife's favor. This rule is not changed by the statute, 1 G. & H. 651, secs. 6, 8.

*Tracy et al. v. Kelley*, 535

## TURNPIKE.

See EVIDENCE, 4.

1. *Subscription of Stock*.—When the articles of association of a proposed gravel road company define the sum of the capital stock, the number of the shares, and the amount of each share, and stipulate that the subscribers thereto agree to take the number of shares set opposite their names, a promise is implied that each subscriber will pay the amount specified per share, as assessed after the organization of the company as a corporation shall be perfected.

*Miller v. The Wild Cat Gravel Road Co.*, 51

2. *Complaint on Subscription*.—*Articles of Association*.—*Where and When Recorded*.—A complaint on a subscription of stock in a gravel road company, which alleges that the articles of association were recorded in a certain county named, is not defective on demurrer because it does not allege that said articles were recorded in the county through which the road was to pass, if an inspection of the termini and course of the road specified in the articles shows that the road was not to run elsewhere than in said county named. Nor is it ground of demurrer that such complaint alleges the articles of association to have been recorded in a certain year; if a more definite and certain time is required to be stated, a motion to make more specific is necessary. *Ib.*
3. *Same*.—*Board of Directors*.—Where such complaint alleges that the calls were made by the board of directors of the company, it is not defective for not alleging that a board of directors was elected and qualified. *Ib.*
4. *Articles of Association*.—*Names of Directors*.—The articles of association of a gravel road company, organized under the statute, 1 G. & H. 474, need not set forth the names of the directors of the company. *Ib.*
5. *Same*.—*Terminus of Road*.—The terminus of a gravel road is sufficiently defined in the articles of association, if they state that the road starts from a definitely described point and runs specified courses and distances to the end. *Ib.*
6. *Same*.—*Exhibit*.—A paper containing a description and survey of a gravel road, although detached from the body of the articles of association, yet is a part thereof, if it is referred to in the articles as a certain exhibit and is expressly made a part of them and is recorded as part thereof. *Ib.*
7. *Steps Necessary to Incorporation*.—A complaint on a subscription of stock in a gravel road company organized under the statute (1 G. & H. 474)

is not objectionable for not alleging, in terms, all the steps to have been taken which were necessary to bring the corporation into existence, if it alleges that certain articles of association, which are set out by copy as containing the contract, and which contain all that is required by law, were entered into by defendant, and, also, that the necessary amount of stock has been subscribed, and that the articles have been duly filed for record. *Ib.*

8. *Tender of Certificates of Stock.*—It is not necessary for a gravel road company to tender certificates of the stock subscribed for before suing the subscriber, when it is not expressly stipulated in the contract that the stock is to be issued on the payment of the money. *Ib.*

9. *Board of Directors.—Bond of.*—Section 7, 3 Ind. Stat. 540, requires the board of directors of a gravel road company to file a bond before the receipt by the company from the county treasurer of money collected on assessments of benefits; it has no reference to collections of stock subscriptions. *Ib.*

10. *Designation of Place of Residence of Subscriber to Articles.*—The use of the double comma following the name of a subscriber of articles of association of a gravel road company, and under a certain named county and state designated by a heading as a place of residence, sufficiently indicates the place of residence of the subscriber to be that county and state. *Ib.*

11. *Juror.*—Stockholders and directors of one gravel road company are competent jurors to try issues between another gravel road and third parties. *Ib.*

12. *Same.*—It is not error for the court to overrule an objection to the competency of a juror based entirely upon the mere supposition and presumption by the juror of the existence of facts which might render him incompetent. *Ib.*

13. *Evidence.*—Oral testimony may be given as to what was done to organize a gravel road company, but not to prove the contents of the articles of association. *Ib.*

14. *Solvency of Subscribers.*—Under the statute for the incorporation of gravel road companies (I G. & H. 474), the solvency or insolvency of the subscribers to the capital stock of the company is immaterial to affect the legality of the corporation. *Ib.*

15. *False Representations.—Location of Road.—Agent.*—The representations of a solicitor of subscriptions to the stock of a gravel road company, made before the organization of the company, concerning the location of the road, and that the stock would not have to be paid for, do not bind the company, and their falsity is no defence, as a failure of consideration or otherwise, in an action by the company on the subscription of a person to whom such representations were made. *Ib.*

16. *Condemnation of Right of Way.—Notice to Justice of the Peace.*—The charter of a turnpike company, in providing the mode of assessing damages for the condemnation of the right of way, directed the giving of notice to a justice of the peace of the county, without prescribing the form or contents of such notice.

*Held*, that the fact that a written instrument filed before a justice by said company, in a proceeding to condemn the right of way over land, after giving notice to the justice, assumed the form of a complaint against the owner of the land, did not vitiate the notice or render it bad on demurrer. *Heady v. The Vevay, etc., Turnpike Co.*, 117

17. *Same.—Construction of Branch Roads.*—Said charter authorized the construction of branch roads, but did not prescribe the mode of condemning land therefor and assessing the damages.

*Held*, that in the construction of branch roads the regulations prescribed in the charter for the construction of the main road were applicable. *Ib.*

18. *Practice on Appeal*.—In such proceeding to condemn the right of way, the land-owner demurred to said notice, or complaint, before the justice, the justice sustained the demurrer, and the turnpike company appealed to the circuit court, the charter giving either party the right to such appeal without prescribing the mode of trial in the circuit court. The demurrer was refiled in the circuit court, and was overruled, and the land-owner thereupon moved to remand the cause to the justice of the peace for the assessment of damages in the mode provided by the charter.

*Held*, that there was no error in overruling this motion.

*Held*, also, that the cause stood for trial in the circuit court *de novo*, as other appeals from justices, and it having been tried, without objection, by a jury of twelve men, no objection could be made to the mode of trial.

*Ib.*

### VARIANCE.

1. *Material Variance*.—Parties to an action must recover, if at all, upon the allegations of the pleadings therein; and when the trial is by the court, it cannot, any more than a jury, go outside of the case made by the pleadings and find for a party upon facts different in their general scope and meaning from the facts pleaded.

*Boardman et al. v. Griffin*, 101

2. *Same*.—Suit on a note, alleged in the complaint to have been made by A., B. & Co. The note introduced in evidence purported to have been made by A. & B. & Co.

*Held*, that there was no material variance.

*Glasgow et al. v. Hobbs et al.*, 239

### VENDOR AND PURCHASER.

See EASEMENT, 2.

*Obligation of Grantee Under Stipulations of Deed*.—Stipulations contained in a deed of conveyance of real estate, to be performed by the grantee, are not obligatory upon him unless he accepts the conveyance.

*Burch v. Burch*, 136

### VENUE.

See CRIMINAL LAW, 26.

*Criminal Law*.—*Change of Venue*.—Where, in a criminal action, an application is made by the defendant for a change of venue on account of alleged bias and prejudice of the judge, the court has no discretion, if the affidavit be sufficient, but must grant the change.

*Manly v. The State*, 215

### WIDOW.

See DESCENT; WILL, 2; WITNESS, 3.

### WILL.

1. *Legacy Charged on Land Devised*.—A devisee who has accepted real estate devised to him is personally liable for the payment of legacies expressly charged thereon.

*Burch v. Burch*, 136

2. *Heirs*.—*Widow*.—A testator by his will disposed of all of his property, leaving nothing to go by descent, making certain devises and bequests to his wife and four children, naming them, and directing that the residue of his estate should be equally divided among his "above named heirs."

*Held*, that the widow was one of the residuary legatees.

*Eisman v. Poindexter, Ex'r*, 401

3. *Lost or Destroyed Will.—Concealed Will.—Practice.—Pleading.—Assuming that the circuit court has jurisdiction, under proper circumstances, to establish a will which has been duly executed, but afterwards lost or destroyed, yet a complaint to establish a will which did not allege that the will had been lost or that it had been destroyed, but alleged that, after the testator's death, the defendant got access to his papers and there found the will and got it into his possession and "concealed and suppressed or destroyed the same," was held insufficient on demurrer, it not being certain from its averments that the will was not in existence and could not be brought before the court to be proved by a citation under sections 25 and 26, 2 G. & H. 556.*

*Kaster et al. v. Kaster et al., 531*

#### WITNESS.

See HUSBAND AND WIFE, 6; NAME, 2.

1. *Heirs.*—In an action by or against heirs, founded on a contract with the ancestor, affecting the property of the ancestor, it must be made to appear, in some legal way, that the ancestor is dead, before an objection can be sustained to the competency of a party to testify as to a matter which occurred prior to the assumed death of the ancestor.

*Hodgson v. Jeffries, 334*

2. *Same.—Construction of Statute.*—The grantee of land, though the son of his grantor, cannot object to the competency of a party to an action against him, which is founded on a contract with his father, affecting said land, to testify as to a matter which occurred prior to the death of his father. Sec. 2, 3 Ind. Stat. 560, does not apply in such a case. *Ib.*

3. *Wife.*—Action against a widow to recover from her the possession of land, the title of which had been fraudulently taken by her deceased husband in his own name, she having paid the consideration, the plaintiff claiming under a sale by the sheriff on execution against the husband.

*Held*, that she was a competent witness to testify as to all matters touching her own rights in said land.

*Tracy et al. v. Kelley, 535*

#### WORDS.

See CRIMINAL LAW, 37.

*Meaning of Ascertained by the Court.*—It is the province of the court, without the aid of witnesses, to ascertain the signification of ordinary words in a written contract, such as the word "feeding," in a contract for the sale of cattle.

*Lowry et al. v. Megee, 107*

*E. C. C. N.*

END OF VOLUME LII.





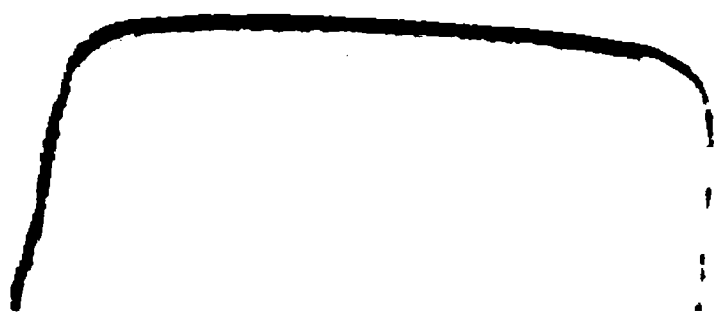








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